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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
DURING THE YEARS
1836-7.

BY GEORGE S. YERGER,
REPORTER TO THE STATE.

VOLUME X.

NASHVILLE:
S. NYE AND CO. STATE PRINTERS.
1838.

Entered according to act of Congress, in the year 1838, by GEORGE S. YERGEN,
in the Clerk's office of the District of West Tennessee.

Rec. Nov. 29, 1890.

THIS volume of Reports contains all the cases decided by the Supreme Court since the publication of those contained in the ninth volume, with the exception of the cases decided at the Jackson, April term, 1838, and at the Knoxville, June term, 1833,—And as I am about to remove my residence to Vicksburg, Mississippi, this volume will necessarily close my labors as Attorney General and Reporter of Tennessee.

I am sensible that, in the discharge of the many onerous and responsible official duties which have devolved on me, I must have often erred; but without, I trust, subjecting myself to the charge of egotism, I may be permitted to say, that my errors were not the result of want of industry or investigation. The duties I have had to perform were many—were laborious, and my only claim to public approbation is, that I endeavored to discharge them conscientiously and correctly. To what extent I have succeeded, it is not for me to say.

Before I close this volume I would do injustice to my own feelings were I not to declare the many obligations I am under to the Judges who have occupied the bench of the Supreme Court during the time I have been in office. Their uniform kindness and urbanity, and the assistance which they have always unhesitatingly afforded to me, will always be held in the most grateful remembrance. From me, however, they require no commendation. The opinions I have published will be an ever enduring monument of their rigid and impartial justice as men, and of their correct, extensive and discriminating legal acquirements as expounders of the law.

To my brethren of the bar, with many of whom I have been long professionally and personally associated, and who have ever extended to me that courtesy and friendly deportment which is the sure characteristic of enlarged and liberal minds, I tender my sincere and unfeigned thanks for the generous and kind feelings which they have always manifested for me. I assure them that, though I shall soon be absent from Tennessee, yet Tennessee friends and Tennessee associations will never be forgotten.

GEORGE S. YERGER.

NASHVILLE, OCTOBER 4, 1838.

JUDGES OF THE SUPREME COURT,

DURING THE TIME OF THESE REPORTS.

HONORABLE NATHAN GREEN,
 ” WILLIAM B. REESE,
 ” WILLIAM B. TURLEY.

GEORGE S. YERGER, Attorney General.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

NASAVILLE: MARCH TERM, 1836.

SHIELDS vs. MITCHELL, TURNER *et al.*

Land held under and by virtue of a deed which is not registered, may be levied upon and sold by an execution at law.

NASHVILLE,
December 1836

Shields
v
Mitchell.

The vendee of land, by the execution of a deed of conveyance, is vested with a title not merely equitable, but an inchoate or imperfect legal title.

The vendor, by the execution of the deed, divests himself of his legal estate; no title, legal or equitable, remains in him; he is seized of nothing for the use of the vendee the title passes from him and no act remains to be done by him to give effect to the conveyance.

If the legal title be not perfected in the vendee, until registration, it does not remain in the vendor; but upon registration, the legal title, by operation of law, vests in the vendee from the execution of the deed.

This bill was filed by the complainant Shields, praying that fifty acres of land lying in White county, (the equitable interest in which, the bill alleged, was in defendant Turner,) might be sold to satisfy a judgment obtained by complainant against said Turner.

The facts agreed on by the parties were as follows: Defendant, Turner, purchased the fifty acres of land before mentioned, from a man by the name of Warren, who executed a deed for the same to Turner. The deed was attested by

NASHVILLE, two subscribing witnesses, but never had been proved and December 1836. registered.

Shields
v
Mitchell.

In January 1830, the defendant Mitchell obtained a judgment against Turner. On this judgment an execution issued, was levied upon the said fifty acres of land, which was sold by the sheriff under and by virtue of the judgment and execution in April 1830. At the sale, defendant Mitchell became the purchaser.

The complainant, Shields, also obtained judgment against the said Turner in February 1830, on which an execution issued and was returned by the sheriff, "*nulla bona*," whereupon, in August 1830, this bill was filed to subject the land to the payment of this judgment.

No fraud or collusion to prevent the deed from being registered, was charged or proved upon any of the parties.

The grounds assumed in the bill are that Turner's deed from Warren not being proved or registered, he only had an equitable interest in the land; that this equitable interest could not be sold by execution at law, that therefore the sale of the land under Mitchell's judgment was void and did not pass any interest, either legal or equitable to Mitchell, the purchaser; and that Mitchell, by the filing of his bill in August 1830, acquired a lien on Turner's equitable interest in the land, to discharge which, it ought to be sold. The decree of the Chancellor was in favor of the complainant, from which the defendants appealed to this court.

Wm. E. Anderson, for complainant. 1st. If there had been collusion between Warren, Turner and Shields, to prevent the deed from being registered and to vest Shields with the title, the case would be parallel in principle to the case of *Vance vs. M'Nairy*, 3 Yer. 171. In the case of *Vance vs. M'Nairy*, Brown delivered the unregistered deed to Vance after the execution sale, and he with a knowledge of the sale suppressed the deed, and obtained a conveyance from Armstrong by the request of Brown, the execution debtor, which the court say, "was a fraud upon M'Nairy."

Without questioning the correctness of the decision in *Vance vs. M'Nairy*, there is one position taken in the opin-

tion, which perhaps was not necessary to the support of the decree given, and which we think was probably not sufficiently considered on that account; that is, "that an unregistered deed passed the legal title to the bargainee." With that deference which we ever feel for the opinion of this court, we would ask that this proposition be re-examined.

NASHVILLE,
December 1836.

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v
Mitchell.

Whether a legal title passes by an unregistered deed, is not a question identical with the enquiry whether such interest or estate passes thereby as is subject to execution sale; the negative of the first proposition is perfectly consistent with the affirmative of the latter. The statute of 29 Ch. II. c. 3, § 10, which was extended to the colonies by the 5th of Geo. II. subjects trust estates to execution.

There were two descriptions of trusts before and since the passage of this statute; one where a trustee was seized in trust to sell, to lease, or rent for the use of another; the second where one is seized to the use of another. In the latter case, the legal estate is executed, or the possession transferred to the use, by force of the 27th Henry VIII. c. 10. In the first case the trust can only be executed in a court of Chancery. Notwithstanding the statute of Charles II. operated upon the trust which could be executed in a court of chancery, yet it cannot be pretended, and never has been pretended that the character of the estate of the *cestui que* trust was changed from an equitable to a legal estate; this would have been giving the same force and effect to the statute of 29th Charles II. as that of 27th Henry VIII. and obliterating entirely the distinction between uses and trusts, which it is believed has never been pretended.

In that description of trust estates executed by the statute of 27th Henry VIII. the *cestui que* use was seised of the legal estate, and could maintain an ejectment or any other suit at law, to sustain which, legal title was necessary; but not so with the *cestui que* trust, where the use was a technical trust, even after the statute of 29th Charles II.

But the distinction which existed in England between uses which were executed by the statute of 27th Henry VIII. and trusts which it required a court of chancery to execute, is obliterated in this country, so far as regards the character of the

NASHVILLE, estate of the *cestui que* use or trust, by the act of 1715, c 38,
December 1836.

Shields
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Mitchell.

§ 5.

By this act no conveyance shall be good and available in law unless proven and registered &c., and all deeds so done and executed shall be valid and pass estates in land &c. Here the estate shall pass by the deed, without regard to the uses or trusts declared, and independent of the source from whence the consideration or purchase money came.

Every estate in this country held for the use of another, no matter how pure and unmixed is the use declared to the *cestui que* use, is a technical trust which can be executed in a court of chancery only; the transfer of the legal estate can be effected only by the registration of a deed, or the decree of a court of chancery vesting title by virtue of the power given them by the act of 1801, c 6, § 48.

We therefore insist that if it shall be holden that an unregistered deed gives such interest to the bargainer as may be sold by execution, yet the purchaser does not obtain the legal title.

Suppose the deed to Turner is lost or destroyed, and Mitchell had to bring his ejectment to recover possession, can it be pretended that he could supply this link in his chain of title by parol proof of the execution of this deed; nor do we expect it would be pretended that he could produce an unregistered deed and read it by proving its execution on the trial.

2nd. Taking it for granted that Turner had an interest subject to execution, yet Mitchell the purchaser under execution obtained an equitable, not a legal estate; he would have to come to a court of equity to obtain the legal estate.

If a purchaser at execution sale be under the necessity of asking a court of equity for its aid to make his purchase available, he will stand in the light of one asking a specific performance of a contract. If the terms of the purchase be fair and equitable, he may obtain the relief he asks; but if they be unconscionable, the court will feel itself as much at liberty to refuse its aid as they would in a case where the purchase was by private contract.

We perhaps might with safety assume that it is a settled rule

of chancery to afford no aid to a purchaser at execution sale, on whom there had been no fraud committed.

NASHVILLE,
December 1836.

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Mitchell.

If Turner fraudulently withheld his deed from registration, Mitchell might ask the aid of the court to compel him to surrender it, that it might be registered, but we insist that that relief would only be granted to one who had given an equitable consideration.

Turner, however is accused of no fraud, his deed may be lost or destroyed by accident; it is not known where it is or why it is not registered. The court has not the power to give Mitchell the relief of having the deed produced and registered; they have not the power to execute such a decree. Turner is beyond the jurisdiction of the court.

What relief would the court give Mitchell? Would they decree the title in him upon his bill? We say that would depend on two things, neither of which he has shown; first, that he had given a fair price; secondly, that his difficulty was the result of a fraud, and not a mere accident, when every body concerned were innocent of any wrong.

Viewing Mitchell therefore as a purchaser, he has not made a case in this record that would entitle him to the aid of this court in consummating his purchase had he filed a bill for that purpose.

Viewing him as a creditor of Turner, he is entitled to the aid of this court in subjecting this property to the payment of his debt, and this we grant him as if he had filed a cross bill for that purpose; but then we claim a preference over him as we are first in asking that aid of the court, and this the chancellor allowed us.

But, thirdly, it is contended by the complainants that the interest of Turner in the land, by virtue of this unregistered deed, was not such as is subject to execution by the statute of 29th Charles II. The trusts embraced by that statute are such as are raised by the instrument or conveyance which gives seisin to the trustee, and are not such as are raised by covenants or agreements of one already seised.

To state the idea more clearly by example. To make a trust estate in Turner of land of which Warren is seised of the legal fee, the trust must be raised by the grant or convey-

NASHVILLE,
December 1836.

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Mitchell.

ance which vested Warren with the legal seisin; and if Warren is vested first with the legal seisin, he cannot by any contract, covenant or instrument, raise a trust upon his existing seisin, upon which the statute of Charles II. operates. This position is so ably and directly established by a decision of the late supreme court of this State, that we offer no further argument but a reference thereto. See the case of *Shute vs. Harder*, 1 Yer. Rep. 1.

George S. Yerger, for defendant. The question in this case is, whether land held by virtue of an unregistered deed, is subject to levy and sale by execution at law.

This question depends upon the construction of the act of 1715, c 38. That act requires all deeds and bills of sale to be proved and registered, or the same shall not be available in law, &c. Did the legislature mean by this, that all deeds not proved and registered should be void and of no avail between the parties? or did they only mean that they should be void as against creditors or subsequent purchasers? The latter has been considered in North Carolina and this State, the true construction.

The vendor by the execution of the deed divests himself of his legal estate. No interest whatever remains in him whether the deed is registered or not; the title in fact passes from him, and the vendee is clothed with an inchoate legal title, made perfect by the registration of the deed at any distance of time.

It is admitted, that, as to a subsequent purchaser by deed, if the prior deed is not registered in time, it is void, but it is perfect as between the parties.

When the deed is registered, the legal title is in the vendee from the date of the deed.

The above principles are settled in this State and North Carolina, and the reasoning of the court in the cases is believed to be conclusive. *vide Vance vs. M'Nairy*, 3 Yer. Rep: 711 *Morris vs. Ford*, 4 Dev. Rep. 418: 1 Hawks Rep. 87. These cases settle the point in controversy; they explicitly decide that the bargainee of an unregistered deed has a legal interest, which may be sold by an execution at law.

Suppose, however, the argument of the counsel on the other side, that no legal estate passes from the bargainer until registration, and that it remains in him, is correct, still it is insisted, it is such an interest as may be sold at law.

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That part of the statute of 29th Charles II. which subjects trust estates to execution at law, is in force in Tennessee. *Shute vs. Harder*, 1 Yerg. Rep. 1: *Russell vs. Stinson*, 3 Hay. Rep. 4, 5, 6, 7.

If the deed is unregistered, the bargainer, if he has any title at all, has only a bare legal title; the entire beneficial interest is in the bargainee. In such case the bargainer is a mere trustee, he holds it in trust for the bargainee, and the case is literally embraced by the statute of 29th Charles II. *vide* 17 John. Rep. 351: 1 John. Ch. Rep. 62, 57: 18 John. Rep. 94: 2 Blk. Com. 338: 3 Hay. Rep. 4: *Willis on Trustees*, 109, 116, 117, 118.

REESE, J. delivered the opinion of the court.

The question in this case submitted for the determination of the court is, whether the land of one who holds by an unregistered deed of conveyance, is liable to be levied upon and sold by an execution at law? The affirmative of this question was maintained and determined by this court in the case of *Vance vs. M'Nairy*, 3 Yerg. Rep. 171. That case was in one form or other, long before this court, and received upon full discussion, the deliberate consideration of many able judges. The bill of *M'Nairy vs. Vance*, was filed in this court, when it was invested with original chancery jurisdiction. It was brought to final hearing before judges Haywood, Whyte and Emmerson. They determined the case in favor of the complainant M'Nairy, establishing thereby the principle, that land, held by an unregistered deed, is subject to execution sale. A bill of review was thereupon filed in the court of Errors and Appeals, which afterwards, under an organization of the court, of short continuance, was brought to hearing before Judge Peck, one of the judges of that court, sitting as chancellor, when he determined in favor of the principle of the original decree, upon which, an appeal was taken to the court of Errors and Appeals, and, by judges Whyte and

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Green, the decree of the chancellor was affirmed, as reported in 3 Yerg. Rep. 171. Thus was the question authoritatively settled by the opinion of five judges, and if we entertained doubts of the correctness of that opinion, we ought to feel much difficulty in giving effect to those doubts, by overruling a decision, formed after discussion so full and so frequent, and sanctioned and fortified by so large an amount of learning and ability. But we do not entertain doubts of its correctness. We think land, held by an unregistered deed of conveyance, is liable to be sold by execution at law, not because the statute of 5th Geo. II. c 7 § 4, has given operation here to the statute of 29th Charles II. § 10, and subjected certain species of trusts or equities in the latter statute described, to the action of a *fi. fa.* (see 1 Yerg. 1,) but because the vendee, by the execution of a deed of conveyance, is vested with a title, not equitable merely, but with an inchoate and imperfect legal title also. The vendor, by the execution of the deed, has divested himself of his legal estate; no title, legal or equitable remains in him; he is seised of nothing for the use of the vendee; he is not a trustee for the vendee. The title passes from him and no acts to give it effect remain to be done by him. If the legal title be not perfected in the vendee, until registration, it does not remain in the vendor. Upon registration, the perfect and entire legal title by relation and operation of law, vests in the vendee from the execution of the deed. If it be never registered, it does not revert in the vendor.

Subsequent to the case of *Vance vs. M'Nairy*, the question in that case came before the supreme court of North Carolina, and their decision is reported in the 4th volume of Devereaux Reports. It is true in 1812, that State by statute subjected equities to execution sale, but the decision of the court is not based upon that statute.

The opinion of the court was delivered by Judge Gaston, a most able lawyer and enlightened judge. He says "that the estate which the debtor held under the unregistered deed was conveyed by the sheriff's deed to the plaintiff; for, says he, it was to many purposes a legal interest, although the title was not legally completed. Such an interest it was holden in the case of *Prince vs. Sykes* and *Iles*, (1 Hawk. 87,) was li-

able to seisure and sold under an execution before our act of ^{NASHVILLE,} 1812, which authorised the levying of executions upon equita- ^{December 1836.} ble estates. - The bargainee after the execution of the deed, and before the registration has not a mere equity in the land, he has an equity and an incomplete legal title. When the registration takes effect he is then perfect owner from the time of the execution of the deed. If he dies before registration, his wife is entitled to dower as of a legal estate. If a *præcipe* be brought against the bargainee, and a recovery upon it before enrolment, it is good, for he was tenant of the freehold." See also the case of *Tolar vs. Tolar*, 1 Dev. Eq. Rep.

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In the case of *Prince vs. Sykes and Iles*, 1 Hawks, 87, the able counsel who argued that case, Mr. Gaston for the complainant, and Mr. Mordecai for the defendant, took the same view of this point. The latter specially insisting that the execution sale was good, and that although the deed of the debtor was unregistered and had been destroyed, yet by the sheriff's deed, complainant had been so far vested with the legal title that he might when sued at law, have defended himself in the ejectment brought against him, and therefore ought not to have come into chancery for relief. This is adverted to, in order to show the course of legal thinking among eminent lawyers in that State.

We adhere, for the foregoing reasons, to the authority of the case of *Vance vs. McNairy*, and those reasons we apprehend, stand in no need of the auxiliary support, to be drawn from the consideration of the inconveniences which would result to the community by permitting and encouraging bargainees to keep their deeds from being registered, or to destroy them when execution sales might become imminent.

The decree of the chancellor will be reversed and the bill be dismissed with costs.

Decree reversed.

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A *prochein amie* has no legal right or power to compound or receive the money due upon a judgment recovered by him in the name of an infant, and a payment to him of such judgment is a nullity; particularly if the payment is made after the judgment has been enjoined and the cause is depending in a court of chancery.

Query, Whether a payment of a judgment or decree to a guardian *ad litem*, is valid.

Payment of a judgment or decree to the father, as guardian by nature, does not discharge the judgment or decree.

A guardian by nature has only the care and custody of the infant's person; he has no control whatever over his property, real or personal.

In this case the judgment was compounded or paid to an agent of the *prochein amie*, who had, however, by letter, before the payment, revoked the agency. The minors, in whose favor the judgment at law was rendered, were distributees of the *prochein amie*, and their distributive share amounted to more than the judgment. It was held, that the judgment debtor should be left to his remedy at law, if any he had, against the administrator of the *prochein amie*, and that this court under the circumstances, would not compel the minors to look to the estate of their intestate for payment,

At the January term, 1829, of the Supreme Court for the State of Tennessee, sitting at Nashville, Isabella Kaigler and Wm. W. Kaigler, infants under the age of twenty-one years, who sued by their father, David Kaigler, as *prochien amie*, recovered judgment against Thomas Miles, (the complainant,) for the sum of \$687 18, the payment of which was enjoined by this bill in chancery, filed May 6th, 1829.

On the 24th of March, 1829, David Kaigler executed a power of attorney to John B. Miles, by which he authorized him to receive and receipt for the amount of said judgment from the said Thomas Miles, or from any sheriff who might have collected the same, and to agree, compromise, or compound said claim as he might think proper. In this power of attorney David Kaigler calls himself father and guardian of the said infants, Isabella and Wm. W. Kaigler; the proof shows that he was their father, but not their guardian, except so far as being their father constituted him such. About the last of May, or first of June, 1829, David Kaigler wrote a letter to Robert M. Burton, the lawyer who had prosecuted

the suit in favor of the minors to a judgment, directing him, if he had not paid the money to John B. Miles, the attorney in fact, not to do so, and not to acknowledge his agency in the transaction. Sometime in July or August, 1829, Burton saw complainant and showed him the letter, and directed him, if he had not paid the money to John B. Miles, not to do so, as the power of attorney was thereby revoked. On the 15th of September, complainant, compounded or as he alleges, paid the debt for which the judgment had been rendered at law, and which had been enjoined by this bill, to John B. Miles, the attorney in fact, notwithstanding the information communicated to him by Mr. Burton. David Kaigler refused to ratify what had been thus done, but died before a final hearing of the case, and by a supplemental bill his administrator was made a party thereto, who by his answer shows funds distributed to Isabella Kaigler and Wm. W. Kaigler, children of David Kaigler, more than sufficient to cover the amount of the judgment compromised as above stated.

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Upon the above statement of facts, the court below rendered a decree in favor of complainants, from which the defendants appealed to this court.

R. J. Meigs, for complainant in error. The questions are: 1. Can a *prochien amie* compromise a judgment recovered at law for an infant? 2. Can he authorize another to do it in his name? 3. Is notice by a creditor to his debtor, not to pay to an attorney in fact of the creditor's, a revocation of the attorney's power?

1. A guardian, *ad litem*, may acknowledge satisfaction of a judgment on record, T. T. 23 Car. 2, B. R., cited 1 Chitty's Bl. 362, 472; Moore's Rep. 852, cited 3 Bac. Ab. 617,

A *prochien amie* and guardian are often all one. 2 Inst. 259; Commentary on St. West 1, c 48, § 7, 8; Ib. 390; Commentary on West 2, c 15. The court will take care that a *prochien amie* be a person of substance. 1 Atkins, 570; and will make him give security for costs. 1 T. R. 491.

The reason why a *prochien amie* and guardian are said by Lord Coke, to be often all one, is manifestly the following:

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When an infant is sued, the power of appointing a guardian, *ad litem*, belongs to the court, as a mere incident of its jurisdiction of the cause. 1 'Thomas' Co. Litt. 285, (top page) note. As the power is an incident, there must be a *lis mota*, as an occasion of its exercise. Hence it is only for defendants that the court can appoint such a guardian. But the court have no incidental power to appoint a guardian for an infant *ad litem movendum*. This is the duty of a general guardian. But if he, himself, is to be sued, or if, when an infant has a just cause of action against a stranger, he neglects to right him, here is a manifest defect of justice. To remedy this, the two statutes of Westminster, above mentioned were passed, which, in effect authorises the court to appoint a guardian *ad litem movendum*. He is therefore many times in our books, says Coke, taken for guardian, and guardian for him, because he is in fact a guardian, though called by another name, therefore, what a guardian *ad litem* can do, the guardian *ad litem movendum*, or *prochien amie* may do. If a guardian *ad litem* may acknowledge satisfaction on record of a judgment recovered in behalf of the infant, so may a *prochien amie*. Now the power of acknowledging satisfaction is no other than the power of giving an acquittance or receipt of the highest solemnity, and includes the power of releasing, compounding, or compromising the judgment; i. e. of receiving the money adjudged, or an equivalent.

2. It has been decided, that though an infant cannot submit his suit to arbitration, his guardian or other person may submit for him, and the person submitting shall be bound by the award. Watson on Arbitration, 21, 42. If he may do this, he may appoint an arbitrator of course. Now John B. Miles was empowered "to agree, compound, and compromise" this claim of the infants, and so had the power of, and was in effect an arbitrator. The principle that a guardian may submit for an infant, and bind himself that he shall perform the award, was established, in contradiction to former determinations, by *Roberts vs. Newbold*, Comb. 318, cited Tomlin's Law Dic. Award II.

3. The third question is settled in the negative, it. 5 Term. Rep. 214, 215. NASHVILLE,
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4. But if there is any doubt that the infants are directly bound by the acts of John B. Miles, acting as the attorney in fact, or chosen arbitrator of their *prochien amie*, they are at least bound by his acts, as the agent of their ancestor, to whose estate they have succeeded as heirs and distributees.

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Whatever the plaintiff paid to John B. Miles, as agent of David Kaigler, he would have a right to recover from David Kaigler, on failure of the consideration for which it was paid. Now if the infants are entitled to their execution, notwithstanding the satisfaction of the judgment through the agency of John B. Miles, then the consideration on which the plaintiff paid him is gone, and he has a right to be restored to his money. But that money is in the hands of the infants, as representatives of their father. Therefore, if they insist on a second payment, they ought to be compelled to suffer the plaintiff to be substituted in their room to their father's estate, *pro tanto*. But this would be attaining justice by a circuitry to which the court will not resort.

Again, if the money never came into the hands of David Kaigler, but yet remains in possession of John B. Miles, then the defendants must look to him, because their ancestor must have looked to him, and they now represent their ancestor's obligations and rights.

F. B. Fogg & Co. S. Yerger, for defendants. 1. If the judgment mentioned in the pleadings had been paid by the defendant in the manner, and under the circumstances stated in the bill, it was a payment made to a person not authorised by law to receive it, and cannot operate as a satisfaction of the judgment.

Admitting that David Kaigler authorised John B. Miles to receive the money from the defendant, what right had David Kaigler to give such authority? He was not appointed the guardian of his children; and his authority, if he had any, must therefore result from the fact, that he was the father of the complainants, and was their *prochien amie* in

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these relations authorised him to satisfy the judgment.

When a judgment is recovered by a minor, it constitutes a part of his personal estate. The money due upon the judgment, when collected, must be paid into court, or paid to the legally constituted guardian of the minor. And by the act of 1762, c 5, § 5, 7, 9, 10, no person can legally receive or take into possession the personal estate of an infant, but a testamentary guardian, or a general guardian appointed by the court.

Payment to the father of an infant as guardian by nature, or for nurture, is unauthorised by law. The natural guardian, or guardian for nurture has only the care and custody of the person of an infant, not of his property. Co. Litt. Hargrave's, note 66 & 67; 2 Wendal's Rep. 153; 1 Roper on Legacies, 580, 590; 1 John. Ch. Rep. 3; 6 John. Ch. Rep. 553, 591.

So payment to a guardian, *ad litem*, would not be a satisfaction of the judgment. 3 Institute, 261, 390; 3 Bacon Ab. 413, 410, (note;); 2 Croke's Rep. 640; 3 Blk. Com. 427.

The power of a *prochien amie* is limited to the management of the cause: The Statutes of Edward authorising minors to sue by *prochien amie*, was not intended to confer on them the powers of a general guardian. His authority ceases when the judgment is rendered. The extent of his power may be seen from the form of his admission to prosecute. 2 Archbold's Practice, 143; Tidd's Appendix, 3 Bacon Ab. 413, 617, 621.

If the rule were not as we contend, great injury would frequently be the consequence to the estates of minors. By our law and practice any person may sue as the next friend of an infant. The *prochien amie* may frequently be wholly irresponsible. No security is ever required of him, except for costs, and thus, in many cases, if the judgment is satisfied by payment of the money to him, it would be wholly lost to the infant.

The Court of Appeals of Kentucky has decided he has no authority to receive the money due upon a judgment recovered by an infant. 2 Pir. Digest, 301.

2. If David Kaigler had the right to receive the money, we contend it never was paid to him. The facts and proof in the cause show that the whole transaction was in fact a fraud upon the rights of these infant complainants. The pretended payment was made to John B. Miles, who at one time was authorised by power of attorney from David Kaigler to receive it, but this authority was revoked, and the payment made by the defendant, with full knowledge of this fact.

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But it is said the power was under seal, and could only be revoked by an instrument under seal, and that the letter in this case did not operate as a revocation. We deny that this is the law. No interest passed or vested by the power. It is a bare power to receive money, a bare authority, which may (in whatever form given) be countermanded. 1 Common Law Rep. 277; 2 Livermore on Agency, 308, 309; 1 Yerger's Rep. 169; 2 Stark. Ev. 112, 113, 115. And if it were not revocable at law, except by deed, still in equity it would be a fraud to pay to the attorney after a verbal notice not to do so. Sugden on Powers, 352; 1 Story on Equity, 383.

3. No decree can be rendered against Kaigler's estate, unless he received it, or authorised it to be done. It was paid to John B. Miles, who never paid one dollar to Kaigler in his life time, or to his personal representatives since his death. But even if Kaigler had received it, the remedy at law is plain and unembarrassed, and the rule is, if, in a case in equity a question purely legal arises, which the court might or might not determine, the court will dismiss the bill. Story's Equity, 89, 91; 5 Yerger's Rep. 142; 4 Do. 91.

TURLEY, J. delivered the opinion of the court.

The first question for our consideration is, did the *prochien amie* have the legal power to compound this debt, which embraces two propositions: 1st, If the judgment had remained at law, could he have done so? 2nd, if he could, can he do so after the case is removed into a Court of Chancery, without the consent of the chancellor? The rights of infants have at all times been guarded with jealous care by

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courts of justice, and an interference in any way with their estates, except by persons authorised by law, discountenanced. To such an extent has this principle been carried, that even a father, who is a guardian by nature of his infant child, has only the care of his person, and is not permitted to have any control whatever over his property, real or personal. Coke Lit. 184; 1 Eq. Ca. Ab. 30; 3 Rep. in Cha. 165; 2 Mass. Rep. 55; 1 John. Chan. Rep. 3; 2 Wend. Rep. 153. So that if he receive a debt or legacy, he can give no acquittance therefor, and the debtor or executor will be responsible to the infant upon his arriving at full age, as if they had not paid the father. The reason and justice of this rule is obvious, the infant has not discretion to protect his own rights; his father may be totally unworthy of trust and confidence, and there is no security for his ultimate responsibility. Is there any reason why this principle of law should not be applied to a *prochien amie*, as well as guardian by nature? None that we can see, on the contrary, there are additional and striking reasons why it should. The father has every motive of affection and regard for his child, to induce him to attend honestly and faithfully to his interest; a *prochien amie* is, or may be, a stranger to him in feelings, governed by no natural sympathies in his favor, and upon whom there is no obligation for a correct performance of his trust, save his integrity, and the respect in which he may hold public opinion. There is no adjudicated case produced, in which it has been determined, that a *prochien amie* has any greater authority over the estate of the minor, whose interest he is protecting, than would a guardian by nature. A judgment, when obtained, forms a part of his estate, and if a father will not be permitted to receive it, because it would not be considered safe in his hands, upon what principle can the *prochien amie*? It is said in argument, that a *prochien amie* and guardian *ad litem* are the same, and that a guardian *ad litem* may acknowledge satisfaction upon a record for a debt recovered at law for the infant; to support which are cited 1 Chitty Black. 372, in note; and 3 Bacon Ab. 617, note b. There is some similarity between a guardian *ad litem movendum* and a *prochien amie*, but still a guardian *ad litem*

and *prochien amie* are not the same, for it is well settled, that though an infant may prosecute a suit by *prochien amie*, yet he must always defend by guardian. But this question is of little importance, as we do not think that the authorities referred to, support the position that a guardian *ad litem* may receive the money recovered on a judgment in favor of his ward. The position, as above stated, from 1 Blackstone is, that he may acknowledge satisfaction of record, but it does not necessarily follow that he is to receive the money. We apprehend that in England, upon the payment of a judgment, a satisfaction is always entered of record, and this must be done by the person having power to make it, which in the case of infants must be the *prochien amie*, or guardian *ad litem*, but surely, if he were permitted to receive the money and enter the satisfaction, he would not be permitted to carry it out of court, and why? because, as soon as the judgment is satisfied, his connection with the infant ceases entirely, his office has been performed, and for what purpose shall he take the money.

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The case from Moore, 52, referred to in 3 Bacon, 617, says a guardian was ordered to acknowledge satisfaction for so much as he received upon a judgment. So far as the court can see, this is the case of a general guardian, who has the care and control of his ward's estate, and the right to receive and receipt for debts and judgments. We therefore think there is no authority for saying, that in England a *prochien amie* may receive and take out of court the judgment debt of a minor, but if it were so there, we would not hesitate in refusing to be governed by a similar principle.

In England, a *prochien amie* is appointed by the court, and he must be a man of character and substance; but here, any person who chooses, can act as such, no matter what his means and standing may be, provided he can give security for cost. We do not mean to say, that this has been settled by judicial determination, but by a practice so long pursued and acquiesced in, as to render it impossible to alter it, but by legislative enactment.

We have examined this question, as if the *prochien amie* had really received payment of the judgment, when nothing

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is further from the truth. It is true it is called a payment, and although it is no where stated what and how much was paid, yet we ascertain from the proof that a horse formed part thereof; then this was compounding the judgment, and we apprehend that this is the first time that it was every seriously contended that a *prochien amie* had the power to compound the claim of the minor, whose rights he was enforcing.

But supposing all this was not so, that a *prochien amie's* power over a judgment continues till it is satisfied, and that he has the right to receive and enter satisfaction, what becomes of this power, when the person against whom the judgment at law has been obtained, carries the matter in controversy into a Court of Chancery? Does the *prochien amie* go with it? We apprehend not. He has no interest in the judgment. No decree can be made against him and he cannot defend the minors, but the court appoints them a guardian *ad litem*; can it be possible then that he can do any thing thereafter, by which their rights are to be effected? Surely not. In England, before the judgment could be enjoined, the money had to be paid into court. No chancellor would permit the *prochien amie*, who has prosecuted the suit at law, to withdraw the funds from court, but would direct the clerk and master, upon a determination of the matter in controversy in favor of the infant, to vest it for his interest, if he had no general guardian to whom it could be paid. In this country, upon a judgment being enjoined, instead of requiring the money to be paid into court, bond and security is taken for the performance of the decree; but this does not change the practice of the court; the money upon being collected will still, in the absence of a guardian, be loaned at interest for the benefit of the minor, under the superintending care and control of the court. It then follows, that the attempt made in this case by the *prochien amie* to compound and settle the matter in controversy, between the complainant and the infant defendants, can in no way effect their rights.

The second question for consideration is, whether, inasmuch, as the defendants, Isabella Kaigler and Wm. W. Kaig-

ler, are distributees of the *prochien amie*, David Kaigler, deceased, and, as it appears from the answer of his administrator, that a sufficient amount of his effects have been distributed to them to cover the amount of the judgment compounded with the complainant, they are not bound to submit to the act of the *prochien amie*, compounding the debt, and look for a payment thereof to his estate. This involves the power of the court to decree a satisfaction in favor of infant defendants against the administrator of David Kaigler, and the fairness of the transaction by which the judgment was compounded between the complainant, Thomas Miles, and John B. Miles, the attorney in fact. Whether the court has the power to give the decree asked against the administrator, we do not think it necessary to determine, as we are satisfied that the fairness of the settlement is more than questionable. Thomas Miles had shown no disposition whatever to pay the demand; he was particularly defending himself against it; he had not even shown a disposition to make any arrangement whatever about the controversy, until John B. Miles comes forward with a power of attorney, authorising him to compound and compromise the same; but when that takes place, we find a great anxiety on his part to put an end to the suit by settlement with the attorney. To such an extent is this carried, that he proceeds to do so, notwithstanding he is informed that David Kaigler had written a letter to the attorney at law, who was prosecuting the claim against him, not to pay the money, if recovered, to John B. Miles, or acknowledge his agency in the transaction, which letter was shown to him, and which he was informed was a revocation of the power of attorney. Why all this, unless he expected to make a favorable compromise? Again, why not inform us what was paid, and how much? Complainant, in his amended bill, does not state, nor does John B. Miles, in his deposition state the amount—suspicious circumstances. So, though we do not say there is proof sufficient to authorise us to determine that the settlement was fraudulently made, yet we do say, that it is of so doubtful a character, that a Court of Chancery ought not to establish rights under it, and that the complainant, if he have any recourse against the administrator

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B. Miles, ought to be left to pursue it at law. This we the more readily do, because the debt was compounded, not paid; and if the complainant be entitled to remuneration therefor, it should be only for the amount he actually advanced, which is unliquidated, and cannot be ascertained by a reference to the clerk and master, without taking much more proof, and which when taken very possibly might satisfy the court of the iniquity of the transaction, and besides, all the questions arising out of the compromise can be better settled by a jury than a Court of Chancery.

We therefore reverse the decree of the court below, and dismiss the bill without prejudice as to any right the complainant may have at law, arising out of this transaction, against either the administrator of David Kaigler, or John B. Miles,

Decree reversed.

WILLIAMS vs, WILLIAMS.

Testator devised as follows:—"I give and bequeath to James Williams, son of Sam all the land that I possess not otherwise disposed of by this will. I also bequeath to him Big Sam and his wife and and all their children: also Pat and his wife and their two youngest children. I also give him all my stock of all kinds, household and kitchen furniture, with all my notes and accounts, with my stills, whiskey, and every thing else not otherwise disposed of," &c. Held, that the residuary clause was not restrained to articles *ejusdem generis*, with those immediately preceding it, but passed all the residue of the testator's estate, including slaves not bequeathed.

This is a bill filed by an executor against his co-executor, seeking the construction of the will of their testator, and to have the trusts of the will declared. The will is in these words: "In the name of God, Amen, being in low state of health, but in soundness of mind, and knowing the certainty of death, and the uncertainty of life, I make this my last will and testament.

"*Item first.*—I give and bequeath to my nephew, James Williams, commonly called Long Jim, one negro man, called

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"Item second.—I give and bequeath to my nephew, Ephraim Williams, one negro boy, named Jacob, and a girl named Polly, and their increase forever.

"Item third.—I give and bequeath to my niece, Sally Wilson, one negro girl, named Crese, and to the heirs of her body forever.

"Item fourth.—I give and bequeath to my nephew, John Williams, son of Sam, that part of my tract of land lying on the east side of the branch that runs by my horse mill, so as to include all on that side that was in my first purchase. I also give and bequeath to him one negro woman, called Black Judy, and her increase forever.

"Item fifth.—I give and bequeath to my nephew, Henry Williams, son of Sam, one negro man, named Simon, and to his heirs forever.

"Item sixth.—I give and bequeath to nephew, Thomas Williams, son of Sam, one negro man, named Willis, and to his heirs for ever.

"Item seventh.—I give and bequeath to my niece, Peggy Williams, daughter of Sam, four hundred dollars.

"Item eighth.—I give and bequeath to William Roberson, son of Nancy, daughter of Samuel Williams.*

"Item ninth.—I give and bequeath to Jeremiah H. Shelburne, five hundred dollars.

"Item tenth.—I give and bequeath to James Williams, son of Sam, all the land I possess, not otherwise disposed of by this will. I also give and bequeath to him Big Sam and his wife, and all their children, also Pat and his wife, and their two youngest children; also give him all my stock of all kinds, household and kitchen furniture, with all my notes and accounts, with my stills, whiskey, and every thing else not otherwise disposed of, by his paying Peggy the four hundred dollars that I have given her in this will, in twelve months, and by paying Jeremiah H. Shelburne the five hundred dollars that I have left him in this will in two years; also by

* No legacy is mentioned in this item,

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paying William Robinson the four hundred dollars that I have given him in this will in three years; also all my just debts he is to pay. It is my will that James Williams, called Long Jim, and James Williams, called Bald Jim, execute this my will. Given under my hand and seal this 28th day of November, 1825.

The complainant, who filed the bill in behalf of himself and the next of kin, is the legatee in the first item, and is James Williams, commonly called Long Jim. The principal defendant is James Williams, called Bald Jim, and the devisee and legatee in the tenth item.

It appears from the pleadings and proof in the cause, that James Williams, the testator, at the time he made his will, (28th Nov. 1835,) was an old man of sixty years of age, or upwards, with little or no education, and had never been married; that he had seven or eight brothers and sisters, all, or nearly all of whom were dead, leaving a numerous offspring, scattered over the western country. That he resided on a farm which he owned and carried on, possessed many slaves and much other personal property, all of considerable value. It also appears that James Williams, the defendant, his nephew, lived with him and managed his business at the time the will was made, and had done so for twelve or fifteen years previously, and continued to do so until his death, which took place in 1832. The testator died possessed of the same lands and also the same slaves, mentioned in the will, together with others which were subsequently acquired by him.

The chancellor decreed, that the slave property acquired subsequently to the making of the will, and before the death of the testator, did not pass by the general words used in the tenth item of the will. From this decree the defendant James Williams, prosecuted an appeal to this court.

Geo. S. Yerger & Richard Andrews for complainants, contended, 1st. That the general words used by the testator in the tenth item did not, in the connexion they were used, pass slaves subsequently acquired; that it was well settled, that general words in a will may be restrained in cases, where, from the whole will taken together it is apparent they

were not used in the large and comprehensive sense claimed for them. 2 Williams on Executors, 711.

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2. That in this case the general words in the residuary clause must be confined to articles *ejusdem generis*, with those immediately preceding them in the same sentence; that the rule deducible from all the cases seemed to be, that if a specific bequest of a particular kind of property (limited in number or amount) is given to a particular legatee, and in a subsequent part of the will, other articles of property, differing in kind are given to the same legatee, followed by a general bequest of the residue of his effects or property; the general bequest must be confined to articles of property *ejusdem generis* with those preceding it, and it will not carry property of the kind specifically given in a previous part of the will, because the testator is supposed to have given all he intended of that kind of property to the legatee. They cited *Roberts vs. Kuffin*, 2 Atkins, 112; *Trafford vs. Berriage*, 1 Eq. Cases Ab. 201; *Timewell vs. Perkins*, 2 Atkins, 103; *Boon vs. Cornforth*, 2 Vesey, Sen. 280; *Rawlings vs. Jennings*, 13 Vesey, 39; *Sutton vs. Sharpe*, 1 Russell's Rep. 146; *Collier vs. Squire*, 3 Con. Ch. Rep. 485, *Tucker vs. Clisby*, 12 Pickering's Rep. 22; *Peay & Pickle vs. Barber*, 1 Hill's Ch. Rep. 97.

W. E. Anderson & John Marshall, for defendant, James Williams, insisted, that the general words used by the testator, in the residuary clause, were intended by him to carry the whole of his property of every kind and description. It was his intention to make the defendant, James Williams, his residuary legatee. He had disposed of such of his property specifically to such of his relatives as he intended should be objects of his bounty; that such was his intention, was manifest from the fact, that first, he says in the first part of his will, he intends to dispose of all his property, and second, he imposes a charge upon the residuary legatee; he compels him to pay his debts and some of the moneyed legacies.

This is not a case where general words in a will, will be restrained to articles *ejusdem generis*. This rule of inter-

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pretation (if it be a settled rule) is not applicable to residuary bequests. A strict analysis of the cases will show, that no case ever has gone so far as to declare that words so general and comprehensive as these, when used in a residuary clause have been restrained to articles *ejusdem generis*. The counsel cited and commented on the following cases, *Cook vs. Oakley*, 3 P. Wms. 302; *Trafford vs. Berriage*, 1 Eq. Cases Ab. 201; *Woolcomb vs. Woolcomb*, 3 P. Wms. 112; *Boon vs. Cornforth*, 2 Vesey, Sen. 280; *Critchlow vs. Syms*, 3 Atkins, 61; *Roberts vs. Kuffin*, 2 Atkins, 112; *Cavendish vs. Cavendish*, 1 Brown's Chan. Rep. 467; *Porter vs. Turney*, 3 Vesey Rep. 311; *Wild vs. Hollymayn*, 5 Vesey, 811; *Rawlings vs. Jennings*, 13 Vesey, Jr., 39; *Flemming vs. Brook*, 1 Sch. & Lefoy, 318; *Hotham vs. Sutton*, 15 Vesey, 320; *Campbell vs. Prescott*, 15 Vesey, 502; *Mitchell vs. Mitchell*, 5 Madd. Rep. 49; *Hearn vs. Wigginton*, 6 Maddox, 82; *Stuart vs. Earl of Bute*, 3 Vesey, 212; *Jones vs. Lord Lofton*, 4 Vesey, 166; 2 Jacob & Walker, 399; 2 Wms. on Ex. 711; 1 Roper on Legacies, 198.

REESE, J., delivered the opinion of the court.

We are called upon to give a construction to the will of James Williams, which is annexed to the bill of complainant. The will itself manifests, that the testator was possessed of a considerable real and personal estate, consisting of lands, negroes, stock, &c. The question arises upon the tenth item in the instrument. The items from the first to the sixth inclusive, give to that number of testator's relations specific legacies of negroes, with an additional devise, in one instance, of a tract of land. The seventh, eighth and ninth items give money legacies, amounting in the aggregate to thirteen hundred dollars. The tenth and last item of the will is as follows: "I give and bequeath to James Williams, son of Sam, all the land that I possess, not otherwise disposed of by this will. I also give and bequeath to him Big Sam and his wife, and all their children; also Pat and his wife and their two youngest children; also I give him all my stock of all kinds, household and kitchen furniture, with all my notes and ac-

counts, with my stills, whiskey and every thing else not otherwise disposed of, by his paying Peggy, (meaning Peggy Williams,) the four hundred dollars that I have given her in this will, in twelve months, and by paying Jeremiah H. Shelburne the five hundred dollars that I have left him in this will, in two years; also, by paying William Robinson the four hundred dollars that I have given him in this will in three years; also, all my just debts he is to pay;" and he then appointed him and the complainant his executors.

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At the date of the will the testator possessed a negro slave Judy, and her child, not specifically bequeathed, and before his death, there were other slaves born, and some purchased, as was likewise purchased a small piece of land. The latter it is on all hands admitted does not pass by the devise of the will. The only question therefore is, whether the tenth item of the will which specifically enumerates and gives to the defendant so large a portion of the real and personal estate of the testator, constitutes him also residuary legatee? It is a principle sanctioned alike by reason and by authority, that when one engages in an act so solemn and important as the execution and publication of a last will and testament, he is not to be presumed as intending, with reference to any portion of his property, to die intestate. Again, it is well settled, that in the construction of last wills and testaments, the scope and import of the entire instrument are to be considered for the purpose of discovering the intention of the testator, and that such intention, when discovered, is of paramount and controlling influence. This will, then, consisting of ten items, disposes in the first nine of a considerable share of testator's estate to nine persons, who seem to have been all of them, and in no very unequal degree, the secondary objects of his bounty. In the tenth and last item of his will, he for the first time mentions the defendant, who seems to be the chief object of his bounty. To him he gives all his land, not otherwise disposed of by the will, the negroes named, all his stock of all kinds, his household and kitchen furniture, all his notes and accounts, his stills, his whiskey, and every thing else not otherwise disposed of, on the condition of his pay-

NASHVILLE, ing in the time specified; all the pecuniary legacies of the will
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That the defendant is by the above item constituted residuary legatee is manifest. This is the last item of the will. The defendant is unquestionably, by the first words of the item, constituted residuary devisee of the real estate. Words of enlargement and accumulation are frequently used, as if to show the extent of testator's bounty, as all the land, "all their children," "all my stock of all kinds, all my notes and accounts," "every thing else not otherwise disposed of." &c.

That the last words, "not otherwise disposed of," mean, not otherwise disposed of by the will, is shown by the same words in the same item, applied to land expressly in that sense; again, that all the pecuniary legacies and all the debts are charged upon property described in this item, seems to be founded upon its residuary, rather than upon its specific character. And lastly, the words "every thing else not otherwise disposed of," are clear and appropriate, for the purpose of creating a *residuum*.

But it has been strenuously and elaborately argued, that a rule for the exposition of wills, applicable to this item, has been adopted and enforced by Courts of Chancery, called somewhat quaintly the rule of *ejusdem generis*, and that that rule will have the effect to limit and restrict the general words, "every thing else not otherwise disposed of" to things of the like nature and description with the antecedent particulars, whiskey, stills, accounts, notes, furniture, stock, &c. If it be intended to assert that Courts of Chancery have adopted and enforced a rule of artificial and arbitrary construction, or a rule of legal intention, controlling and countervailing, when necessary, the actual intention of the testator, to be gathered from the context, and scope, and frame of the will, then we have no hesitation in asserting, that a careful examination of all the cases relied on for its establishment, will demonstrate that no such rule in fact exists.

The great rule in the construction of wills, to which this one of *ejusdem generis* and all others, except those founded upon public policy, are not only subordinate, but ancillary, is, that the intention of the testator, to be ascertained from the par-

particular words used, from the context and from the general scope and purpose of the instrument, is to prevail and have effect. In an enumeration of particulars, general and comprehensive terms are sometimes used, in the construction of which, reason and good sense require that if you would not violate the intention of the writer, their meaning must be restricted to things of a like nature and description, with the particulars among which they are found. This is a rule of intention, and it readily yields where the circumstances show that a reliance upon it would defeat, rather than effectuate the intention. A reference to some cases in which the rule has been spoken of will establish the correctness of this remark. The case of *Trafford vs. Berriage*, 1 Eq. Cases Ab. 201, pl. 14, was, "that A. bequeathed to his niece all his goods, chattels, household stuff, furniture, and other things which were then, or should be, in his house at the time of his death." Some time after A. died, leaving about £265 in ready money in the house, and it was decided, that this ready money did not pass, for by the words "other things," should be intended things of the like nature and species before mentioned.

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There was no question here, whether the niece were a general residuary legatee; her interest was to be limited by the locality, goods, chattels, stuff, furniture, things in the house. Money is not likely to be described by its *locale*, but by its amount; and besides, the amount, with reference to the value of other things in the house, may have been such as to make it impossible to believe that if intended to have been given it would not have been given *eo nomine*.

The case in the *Precedents in Chancery*, 8, was this; "B. bequeathed to his wife £1200 in money and all the goods and chattels, plate, jewels, and household stuffs, and stock upon the ground in and belonging to his house in N., in which house there was £400 in money. The question was, whether this last money passed to the wife under the above words, and it was decided that it should not; for £400 was a considerable sum of money, of which the testator could not be supposed to be ignorant, and that had he intended that the money should have passed, he would not have connected

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it with the general words, "all his goods and chattels," but at first would have given to his wife £1600 instead of £1200.

The case of *Woolcomb vs. Woolcomb*, 3 Peere Williams, 111, is, that "one devised to his wife all his household goods and other goods, plate and stock, within doors and without, and bequeathed the residue of his personal estate to J. S. The question was, whether testator's ready money, cash and bonds would pass to the wife by these words? It was contended, that the words, "other goods," were sufficient to pass the whole personal estate. To which it was answered, that if the words, "other goods," were taken in so large a sense, it would make void the bequest of the residuum, which would not be allowed. That it seemed reasonable the words, "other goods," should be understood to signify things of the like nature with household goods, to the end that the whole will might have its effect, and of this opinion was the chancellor," &c. In the case of *Cavendish vs. Cavendish*, 1 Brown's, C. C. 437, "The testatrix bequeathed her cabinet of curiosities, consisting of coins, medals, gems," &c. The question was, whether any thing would pass that was not an article in the cabinet of curiosities? And it was decided that the general words must be restricted to such things as properly belonged to a cabinet of curiosities. But it were needless to cite all the cases referred to in argument; they will all be found to have turned very much upon their own particular circumstances, and they will all manifest the solicitude of the courts to attain, by the adoption or rejection of the supposed rule in question, or other rules, as circumstances might require, the purpose and intention of the testator. In a very late case, *Arnold vs. Arnold*, 2 Myln and Keene, 365; 8 Con. Eng. Cha. Rep. 36, a bequest of "wines and property in England," was held to pass the testator's property in England of every description, including money in the funds and at his bankers, debts and arrears of a pension due him, and was not confined to property *ejusdem generis* with wines, and in that case the court used the following language, "that the mere enumeration of particular articles followed by a general bequest does not necessarily restrict the general bequest, is obvious,

because a testator often throws in such specific words, and then winds up the general catalogue with some comprehensive expression for the very purpose of preventing the bequest from being so restricted."

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This remark, we think, peculiarly applicable to the case before us. Upon the whole, we deem this a very clear case.

Let the decree be reversed, the bill be dismissed, and the executors pay the cost out of the estate.

● Decree reversed.

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HENDERSON vs. VAULX AND WIFE.

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107	30
110	55
110	56

Testator devised as follows: I give and bequeath to my beloved wife, &c. all my estate, both real and personal, including horses, negroes, cattle, and every other species of property, as well that which is now in possession as that which may hereafter be acquired, together with my money on hand, debts, claims of all kinds or description whatever, and all my lands, tenements hereditaments, with all appurtenances belonging or appertaining, to her, her heirs or assigns, during her natural life; at her death, it is my will and desire she shall have the disposal of one half the property to whomsoever she thinks proper; the other half of my property to be divided among my brothers and sisters. It is likewise my desire that my estate, both real and personal, remain unsold by my executrix hereinafter named. It is likewise my will and desire that my brother, Logan Henderson, and Samuel Anderson, Esq., should counsel assist and help my wife, and that she should not act contrary to their counsel." Testator then appointed his wife executrix Held, that the wife has only a life estate in all the property, with a power of disposition at her death of a moiety.

Where a *specific* bequest of wine, rum, hay, or other articles, the use of which consists in their consumption, is given for life, the absolute and entire interest vests in the devisee.

But where articles, the use of which consists in their consumption, are given in a residuary clause for life, they must be sold and the interest only of the proceeds be given to the residuary legatee for life, unless the testator directs that they *shall not be sold*, in which case the absolute interest will vest in the legatee.

The above rule does not extend to that species of property which are not necessarily consumed in their use, but are only worn out or impaired from being used.

Legatees for life of personal property are entitled to the useful and profitable enjoyment of the property, so far as it is consistent with its preservation; with its usual and ordinary increase, and with the security of the title of the person entitled to the remainder.

Persons to whom personal property is limited in remainder, have a right to be protected and secured against probable danger of its destruction, or against more than ordinary deterioration or an hazard of the title.

Courts of Chancery in this State interfere and protect the property and possession of a master to his slaves, although there may be a remedy at law.

Where slaves are bequeathed for life in this State, the legatee for life has no right or power to remove them beyond the limits or jurisdiction of the State.

This was an appeal from the chancery court at Franklin. The facts are stated in the opinion of the court.

Th. Washington, for complainant.

W. E. Anderson, for defendant.

REESE, J., delivered the opinion of the court.

John Henderson, late of the county of Rutherford, in the State of Tennessee, on the 13th of September, 1833, duly

made and published his last will and testament, and in that year departed this life. This will directs, that all his just debts shall be paid, and adds, "after which, I give and dispose of my property, both personal and real, in the the following manner to wit: I give and bequeath to my beloved wife, Sarah Henderson, the object of my tender regard, all my estate, both real and personal, including negroes, horses, and cattle, and every other species of property, as well that which is now in possession and that which may be hereafter acquired, together with my money on hand, debts, claims of all kinds or description whatever, and all my lands, tenements, hereditaments, with all appurtenances belonging or appertaining, to her, her heirs or assigns, during her natural life; at her death, it is my will and desire she should have the disposal of one half the property to whomsoever she thinks proper, the other half of my property, both real and personal, to be divided among my brothers and sisters, or their heirs. It is also my will and desire that all my estate, both real and personal, remain unsold by my executrix hereinafter named. It is likewise my will and desire that my brother, Logan Henderson and Samuel Anderson, Esq. of Murfreesborough, should counsel, assist, and help my wife, Sarah Henderson, and that she should not act contrary to their counsel. It is likewise my will and desire and I do hereby appoint my beloved wife, Sarah Henderson, executrix of my last will and testament, giving her full power and authority to execute the same.

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The said Sarah proved the will and took upon herself the execution of the same, giving certain of the complainants as her sureties. The estate consisted at the time of testator's death of a valuable tract of land, in the county of Rutherford, whereon he had resided, of about twenty slaves, of a considerable stock of horses, cattle, &c., of household furniture, and implements of husbandry, of several hundred dollars in money and several thousands in debts. After residing some years on the farm, Sarah Henderson, the widow, intermarried with the defendant, Wm. Vaulx, and removed to his residence, in Davidson county, taking with her a portion of the slaves and leaving a portion on the Rutherford farm.

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The bill charges that at the time of its being filed, the defendant, Wm. Vaulx, was about to remove all the negroes, or a large portion of them, to the State of Mississippi, for the purpose of making sale of them; and it alleges, that the sale or settlement of them there would injure their health, impair their value, render doubtful the identity of them and their increase, and greatly endanger the title of those in remainder. It appears from the answer and proofs, that the defendant, and a man of the name of Carter jointly own a tract of land in Jackson county, Mississippi, and have each of them several negroes of their own upon it, and are carrying on the cotton growing business in partnership, that Carter lives there, except in the summer season, and that it was and is the purpose of defendant to remove the slaves in question to that farm, and to reside there himself with his family, except during the summer and fall months. Several other matters are stated in the pleadings, which make it necessary to give a construction to the will above recited, and to determine the rights of the parties under it.

First, then, what is the character and extent of the interest to which Sarah Vaulx, late Sarah Henderson, is entitled by the terms of said will. It is urged in argument that she is entitled to the money and choses in action absolutely, because it is said the testator, in the portion of the will which grants the life estate, distinguishes between property and money, using the former word in a limited and restricted sense, and in the devise over of a moiety uses the term property in the same sense, excluding the idea of money. It is believed this view of the matter is erroneous. The will commences by stating, that testator gives and disposes of his property, both real and personal, in the following manner; the manner is by giving to his wife all the estate, both real and personal; he shows then his sense of the terms, real and personal estate, by adding, perhaps from abundant caution, that it includes negroes, horses, cattle, and every species of property then possessed, or to be acquired, together with his money on hand, debts, claims and demands of every kind and description whatever, and all his lands, tenements, or hereditaments, with all appurtenances belonging or apper-

aining. In the power of disposition given to her, as well as the devise over, having already explained his meaning, he contents himself, as was natural, with the simple use of those fully explained terms, "my property, both real and personal." It is said again, that although of a moiety of the estate, both real and personal, which is limited in remainder, Sarah Vaulx may be entitled to a life estate only; yet of the other moiety which is not limited in remainder, but of which a power to dispose at her death to whomsoever she may think proper is given, that moiety, by virtue of such non-limitation over and power of disposition at her death, is vested absolutely in the wife. To sustain this position many authorities have been referred to, and especially the cases of *Smith vs. Bell*, in *Martin & Yerger*; and *Davis vs. Bridgman*, 2 *Yerger*. With the authority of those cases, although the former was differently decided in the supreme court of the United States, and from the latter Judge Whyte dissented, I am not at liberty to wage a controversy—I am not disposed to do so; I have been in the habit of thinking them correctly decided. There is one thing in which all the judges who have passed upon these cases concur, that is, that in the construction of wills, the intention of the testator is a leading object of inquiry, and that almost every case will depend much upon its own terms and circumstances.

In the case of *Davis vs. Bridgman*, where a life estate is given to the wife, with power at her death to dispose of the property in any mode she might see proper, Judge Catron urges, that it was consistent with the intention of the testator, that she should have sold or given away the property during her life, that it could not be impounded, and that the clause meant nothing more than that she should live upon and enjoy the property in her own way, during her life, and at her death dispose of it as she thought proper. In this case, however, from the power of disposition at the death of the wife, no such inference of the probable intention can be drawn, because the testator says, "it is my will and desire that all my estate, both real and personal, remain unsold by my executrix, hereinafter named." He also expresses his desire that his wife should not act contrary to the counsel of

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Logan Henderson and Samuel Anderson. These clauses, particularly the first, leave no doubt that testator's intention was to limit and restrict the wife's power of disposing of the property to the time of her death; and if it be proper as supposed by C. J. Marshall, in the case of *Smith* against *Ball*, and Ch. J. Catron, in *Davis* vs. *Bridgman*, as certainly in doubtful cases, it is, to look into the circumstances and situation of the parties in interest, and into those of the estate, to ascertain the intention of the testator; there is nothing in either, in the present case, tending in the slightest degree to control the expressed wish and intention of the testator, that all his property should remain unsold by his executrix. It is not necessary, and would be premature, conclusively to settle this point. It is not my intention to do so. It will be time enough authoritatively to settle that question, when the life estate shall fall, and the tenant for life at her death shall have made no disposition of a moiety of the real and personal estate; an event which may never happen. It is proper, however, for some purposes of this case, that an opinion on the point should be now given. The conclusion to which my mind has come is, that the wife has only a life estate, as well of the moiety, which she may dispose of at her death, as of the moiety limited in remainder. It is contended, however, that from the nature of a portion of this property, being of those things of which the use is in the consumption only, a good remainder cannot be limited, and the first taker will enjoy the absolute interest.

It appears from numerous cases, to which it were useless to refer the learned counsel, because relied on by them and read on the trial, that where a specific bequest for life, with or without limitation in remainder, is made of wine, corn, hay, or other things, whose use consisted in being consumed, the first taker is entitled absolutely. But when this bequest is residuary, and not specific, then such chattels must be sold, and the interest only of the proceeds given to the first taker, and the principal is preserved for him in remainder. Accordingly, complainants insist that such property, if it remain on hand in this case, shall be sold, and if not, shall be accounted for.

But the will, in this case, directs that none of the property shall be sold; the operation of which direction, it is believed, will give to the wife the absolute interest in such chattels, in the same manner as if the bequest were specific. The reason why a specific bequest to one for life of things useful only, as they are consumed, confers the absolute interest, though limited in remainder, is that the specific bequest shows that the primary purpose of the testator is, that the first taker should at all events enjoy the property or thing, not merely its value, while its nature is inconsistent with his enjoyment, and that of the remainder man at the same time. So here, if the testator give property of this description to his wife, with remainder over, and direct her not to sell it, she has no property in it, but a burthen, unless she uses it, and therefore, as upon the supposition, she cannot use it at all, without, in the very act of using it, she consumes it, she must have it absolutely. But this does not extend to that species of property, which, though impaired and worn out in the course of being used, is not useful merely as it is consumed.

Secondly—The results then of this view of the extent and character of Sarah Vaulx, late Sarah Henderson's interest by the terms of the will, determines the character and extent of that of complainants, who claim in remainder. They are entitled, with the exception of the property last described, to a moiety of the real and personal estate of the testator, on the termination of the life estate interest of the said Sarah; and as next of kin and heirs at law of said testator, they may become entitled to the other moiety, if said Sarah should not, at her death, execute the power under the will, and make disposition of that moiety. These points have been discussed with much zeal and learning by the counsel, but it is believed that they do not present very much that is either novel or difficult.

We approach now, however, a question of much magnitude and difficulty. I feel its pressure extremely. It is of vital importance, not only to the parties to this record, but to the community at large—I mean the relief to which complainants may be entitled. Complainants insist in their bill,

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and in arguments, that it was the intention of the testator that the wife's negroes and other property should remain upon the farm, upon which he had lived, and that this court should enforce that intention, so far at least as to direct that the negroes be returned and continued there. There is enough in the will to make the impression, that the testator cherished an expectation, perhaps felt a wish that his wife, with her property, should remain on the estate. The direction not to sell any of the property, considering its character as disclosed in the inventory, with the injunction to be governed by the counsel of L. Henderson and S. Anderson, are of a character to produce this impression; but they are not strong and distinct enough to induce the court to restrain her from quitting the premises with her property. Defendants insist, that they have a right to remove the negroes and themselves to the State of Mississippi, where slave labor is more profitable, for the purpose of making said slaves more beneficial to them, in the culture of cotton; that this right results from their limited ownership in said slaves and other property, which so long as it continues is absolute, and must not be impaired or interfered with, by fixing at the instance of complainants, said property within the limits of this state. They urge that complainants are entitled to no relief, except to the filing an inventory and a report from time to time of the increase of the property. It is said, and correctly said, that although formerly the very relation of owner for life and remainder man imposed upon the former the necessity of giving security for the forthcoming of the property at the termination of the life estate, yet the course now is, not to give such security, except in cases of danger, but an inventory. And they insist that at most, in the purpose of removing the slaves out of the state would amount to a case of danger of loss, within the meaning of the authorities, the condition of their bond, if one be required of them, must be merely for the forthcoming of the negroes at the death of Sarah Vaulx, and not for their continuance within the limits of Tennessee. The complainants insist that they are entitled to a forthcoming bond, with security, containing the last mentioned condition. This is the great point

in the cause, growing out of the relation which the parties sustain to the negroes in controversy. Two positions seem alike obvious and important: first, the defendants having the life estate interest, are entitled to the useful and profitable enjoyment of the property, so far as it may be consistent with its preservation, with its usual and ordinary increase, and with the security of the title to it. Secondly, That those in remainder, the complainants, whose beneficial use and enjoyment of the property is postponed till the determination of the interest of the defendants, have a right to be protected and secured against probable danger of its destruction, against more than ordinary destruction, or any hazard of the title. These principles apply in some degree to the relation of tenant for life and remainder man in real estate, as involved in the doctrine of waste at the common law, or they may be deduced more properly from this latter relation. But the property in slaves, and in their increase, resembling in its durability in some degree the property in lands, yet from the peculiar nature of the subject, differing from it in so many striking and essential particulars, asserts its own peculiar principles in ascertaining the rights and liabilities between the owner in possession and owner in remainder.

It is but recently, in this state at least, that the peculiar nature and character of slave property, and of the relation between master and slave, have been regarded in our courts in the spirit of a rational and humane philosophy. A few years ago, and any man who had a judgment debtor, might by virtue of an execution against him, become the owner of the slave of a third party, if he chose in a suit at common law, to pay the value or more than the value. A court of chancery, if the owners had there sought to restrain the bill, or recover the possession, closed its doors upon him, with the information given him, that he had a clear and unembarrassed remedy at law. Afterwards it was discovered as wines, family pictures and plate, and ornamental trees, &c. were protected to the owner in a court of chancery against trespass, so might a slave, if a family slave; and a peculiar favorite with his master. But recently, upon grounds less technical and far higher and sounder, it has been deter-

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mined that a court of chancery will protect the possession and enjoyment of this peculiar property, a property in intellectual and moral and social qualities, in skill, in fidelity and in gratitude, as well as in their capacity for labor; and any owner may now say and show to a court of chancery, I am master, this is my slave, and he shall retain or recover the possession. These principles, founded upon the nature of the property, will necessarily embrace the rights and liabilities affecting the present and future owners, the party in possession and the party in remainder. The remainder man is owner, and entitled to be secured in the specific slaves and their increase, and not merely in their value, or even more than their value. If the owner for life may remove with the negroes to Mississippi or Louisiana, how is the remainder to be secured? It is answered, by a bond with security here, to have the negroes forthcoming at the death of the remainder man. Without urging how precarious such security would be, after the lapse of some twenty or thirty years, by the death of sureties, the operation of our statutes of descents and distributions, and the commercial and ever changing character of our country; without insisting how improbable it would be that those in remainder would get any available remedy upon the bonds, let us suppose that in this case, a bond with ample security shall be taken, that the defendant, his wife, and his negroes go to his farm in Mississippi, and that contrary to the probability of the case, the wife dies in a short time, while the sureties are yet good. The complainants want the negroes specifically, they are favorite negroes, family negroes, at all events they wish the possession of them, how should they recover it? They can only sue upon the bond. In that bond they will not recover the negroes, but their value here, or their value in Mississippi, but probably the former; but suppose the latter, the defendants in exoneration of his sureties pays the money here, as he, needing the negroes would be sure to do, and then the matter ends in a compulsory sale through the agency of this court, and a court of law. If complainants sue in Mississippi will they recover the negroes specifically; we know not their system of laws. This single view of the subject seems to

be decisive. When the negroes leave this state and go beyond the jurisdiction of its laws, we have no further control over them; they may be hired, sold, emancipated, and dispersed through every slaveholding or non-slaveholding state in the Union, or out of the Union. And if, as matter of right the life estate owner can give the bonds and go where he pleases with the negroes, for it results in that, if he remove where we direct or permit him, he may afterwards remove a dozen times; if he can do this of right, then every owner of a life estate can, by giving bond, compel those in remainder hereafter to receive, if they can recover indeed, the money value of their negroes. There are many other views leading to the same result. Our state constitution prohibits the emancipation without compensation to the owner. If the negroes are taken to a state where the fundamental law differs, the title is less secure. The complainants are members of this political community, and have a voice in the formation of its laws; if removed, their slaves would be under a system of laws, in the formation of which they would have no voice. We have a mild penal code, as regards slaves, as well as others; they might be taken where this would be otherwise. We have a much greater portion of free than of slave population; and the slave, without severity, is kept in a due and safe subordination; they might be taken where the proportion is the other way, and where weakness on one side and rashness on the other, might lead to insurrection and consequent destruction of the slave. Here there is a liberal philanthropy and protective public sentiment to the slave—there it might be otherwise. Here the annual profit of the slave's labor bears no very large proportion to his own value, and of course interest is on the side of humanity, and he may not be over worked—there the annual profit may be one third of his entire value, and the temptation would be to overwork him. Here the moderate annual profit of the slave's labor makes an increase of the stock an object, and mothers and children are tenderly treated—there a different state of things may produce a different feeling and a different course. Here we have a temperate, healthful climate—there the climate may be less favorable to

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life. Here, those in remainder could know the state and condition of the property, ascertain whether it was humanely or cruelly treated, be informed of its increase, preserve the evidences of its identity, and their ownership—there, unless they should remove thither, they would be ignorant of all these subjects, and that ignorance would peril their title and interest in the property.

This case has not before occurred. The only cases which have been before our courts have been when the tenant for life was about to run away with or sell the property; but as far as they go they fortify the position I have taken. In the case of *McCutchin & others vs. Price, wife & others*, 3 Hay. 211, when the complainants had a very precarious, indeed the court says only a possible interest, Judge Roane says, “that when a sale or removal is intended, or likely to take place, there security ought to be required, and he ordered defendants to enter into a bond, with security, &c., conditioned that he would not remove said negroes beyond the limits of the state, nor otherwise dispose of them, so as to impair the interest of those in remainder,” &c. If, in the conclusion on this point of the case to which I have arrived, by the aid rather of principle than of authority, I have erred, the error can with little inconvenience be corrected.* But if I am right, and the general interest of the community is in opposition to these views, there is an appropriate department to which the correction belongs.

Decree affirmed.

* This opinion was delivered by Judge Reese, when he was chancellor, the decree was appealed from. The Supreme Court adopted the opinion and affirmed the decree of the Chancery Court.

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The facts which are considered by the court as proved on the hearing, must be stated in the decree.

Where a decree is rendered which does not rectify or allege the facts upon which it is founded, or which the court considered as proved, it is error apparent on the face of the decree, for which a bill of review will lie.

Statutes of limitation do not expressly apply to courts of chancery, but are by them enforced by analogy in all cases where the matter in controversy would have been barred in a court of law, could it have been prosecuted there.

Where an action of debt is brought to recover money paid by mistake, it will not be barred until the expiration of six years, from the time it was so paid; so if a bill is filed in chancery to recover money paid by mistake, the limitation of six, and not of three years forms a bar to the suit.

On the 9th day of April 1830, the complainant, Samuel Burdoin, filed an original bill in the chancery court at Carthage, against Archibald Frith now deceased, which charges that there had been a partnership transaction between the parties entered into in 1825, for the purpose of building a boat and shipping tobacco to New Orleans; that a conditional settlement thereof had been made, but that errors had intervened therein, which the defendant at the time of the settlement and repeatedly thereafter promised should be rectified when ascertained; that with this understanding the complainant, though dissatisfied with the settlement, executed his notes for the amount supposed to be due by him to the defendant; that from this time forward he made repeated attempts to get the defendant to correct the errors, but always met with some excuse or other, alleging a plausible pretext for not doing so, till sometime in the year 1829, he was induced to pay the defendant the amount of the notes given him on said settlement, but still with the express understanding that this should form no obstacle to a correction of the errors and mistakes which had intervened, but that it should be made whenever it might be ascertained that they existed, and that the errors and mistakes amounted to several hundred dollars. All the material charges are denied by the answer of the defendant Frith, and he further more insisted therein on lapse of time and the statute of limitations as a bar to complainants right to relief, if it ever existed.

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The defendant Frith having died, the cause was revived against defendant Shelton his administrator, and it came on to be heard at the July term 1831, of said chancery court, when a decree was entered in the following words:

“Be it remembered that this cause came on to be heard before the Chancellor upon the pleadings and proof and argument of the counsel on both sides, and the matters being considered and fully understood by the court, the court thinks proper to order and decree that complainants bill be dismissed and that complainant pay the cost of this court, and that execution issue, &c.”

On the 20th of June, 1833, the complainant filed this bill to review this decree, in which is set out the substance of the original bill, the pleadings, exhibits and proofs, to which bill of review defendant demurred. The demurrer was on argument overruled, the case reviewed, and a decree given for the complainants, from which the defendant appealed to this court.

J. S. Yerger and *Wm. Hart*, for complainant. 1st. The decree in this case is so general that it furnishes a good ground for sustaining a bill of review. The only difference in this State, and in England upon the form of decrees is, that here the substance of the allegations in the bill and answer need not be set forth, yet the facts found upon the issue proved and the conclusions of law made thereon by the court, are as necessary here as in England. In England when the decree does not set forth the facts upon which it is predicated it will be reviewed for that alone, as otherwise the party will be deprived of the benefit of a bill of review. 1 Vernon Ch. Rep. 214, 216: *Broad vs. Eroad*, 2 Ch. Ca. 161: 2 Mad. Ch. 453. 1 Harrison Ch. P. 108.

The 13th rule of practice in the chancery courts in this State requires the facts to be stated in the decree.

The account should have been decreed in the first instance. The proof shows the transaction to have been one between partners, the settlement was partial and conditional, with continued promises to correct errors made by defendant, down to within a very short time of filing the bill. A great error it

seems crept into the settlement, which it is the province of this court to correct.

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2nd. Lapse of time is no bar to complainants equity when produced by the defendant himself, whether by an express request or by delusive and fraudulent promises. He will not be allowed to set up his own acts as a bar to complainants relief and a shield to himself. Story's Eq. 502, 503, 504.

The statute of limitations does not run in cases between partners until a complete and full settlement has been made, and a balance struck and agreed to by the parties. Gow. on Part. 88 top, 87 top.

The statute of limitation does not bar complainant's equity, because the account was still open and not stated and the balance struck. Gow. on Part. 166 top.

The settlement was only conditional not final, consequently the subject of account and settlement. 11 Wheat 309: 1 Peters 368: 2 Cond. Rep. 460: Gow. on P. 116 top: 2 Ball and Beaty, 433.

The only time when the complainant had a right to sue at law was after he paid the money, which was less than three years before filing his bill. He was not compelled to go to equity so long as defendant did not sue on the notes. 2 Nott and McCord, 443: 3 Dev. R. 253: *Marshall vs. Hudson*, 9 Yer. Rep.: *Bank vs. Campbell*, 8 Yer. Rep.: Theo. on P. and S. 227, 228: 1 Law Lib. 134, 135.

3rd. If complainant could have sued after the first settlement at law, he could have brought an action of debt, which would not be barred under six years, consequently the analogy by which the bar would be made in equity must be six years, which length of time has not elapsed from the original settlement. *McLemore vs. Bradford*, 3 Yer. Rep.: *Hickman vs. Searcy's Ex.* 9 Yer. Rep.

R. J. Meigs, for defendant. There are only two grounds upon which this bill can be even plausibly supported. 1st. That Frith fraudulently procrastinated the correction of errors he knew to have intervened in the settlement of June 1826, and therefore the statute of limitations never began to operate until Burdoin disavowed the fraud; that is, that Frith was aware

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of, and yet really did not intend to correct the error. Supposing Frith actually to have known that there was an error in the settlement (of which however there is no evidence and without which knowledge there could be no fraud in the case,) and to have purposely delayed an examination of the account, yet is there any authority which decides that this species of fraud would prevent the statute from running? The fraud that has that effect, is such concealment or misrepresentation on the part of the defendant, as prevents the plaintiff from discovering his right; and thus being kept ignorant of his right, he is supposed incapable of laches in prosecuting it. Angel on Limitations, 190 and 348. But Frith did nothing to keep Burdoin ignorant of his right, on the contrary Burdoin said he always knew there was error.

The second ground is, that Frith having admitted there was an error in the settlement, promised to correct it and pay what might be found due Burdoin; but the evidence does not show that he admitted the existence of an error. He said if there was an error he would correct it and pay it; but this is not sufficient to revive the debt, because there is really no admission that any debt exists. *Bell vs. Morrison*, 1 Peters S. C. R. 357: Angel on Lim. [226, et seq, *Belote's Exr. vs. Wynn* in this court, 7 Yer. R. 534: *Steel and Strecker vs. Matthews* 9 Yer. R. and *Nichols vs. Crowder*, 9 Yer. Rep.

The decree pronounced upon this bill of review seems to be founded upon a farther examination of matters of fact, though the bill itself is not founded on new matter, but upon error apparent in the decree itself. This proceeding is a violation of Lord Bacon's first ordinance, which says that "no bill of review shall be admitted except it contain either error in law appearing in the body of the decree, without further examination of matters of fact, or some new matter," &c. 4 Bacon's works, 509, ord. 1, 2, 13. Lord Hardwick says these rules have never been departed from since the making of them. 3 Atk. 35. It may be said that as no reasons are assigned for the first decree, no errors can appear in the body of it, and hence a further examination of matters of fact in the case was necessary in order to demonstrate the error. To this we answer that it was not our fault that the chancellor

did not state the grounds of his decree. It is manifest how-
ever, that if the facts can be re-examined on a bill of review,
the process may be carried *ad infinitum*. 1 Vernon, 166,
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TURLEY J. delivered the opinion of the court.

The first question presented for the consideration of the court is, as to the legal power of the chancellor to review the decree originally given in the case. It was argued that this was done in violation of Lord Bacon's first ordinance, which says, that no bill of review shall be admitted except it contain either error in law appearing in the body of the decree without further examination of the matters of fact, or some new matter. 4 Bacon's works, 509, ord. 1, 2, 13. The obligatory force of this rule is not denied by the counsel for the complainant, but it is said that it was framed with a view to the practice of the courts which required the facts on which the decree was based to be embodied therein, and was only designed for preventing an allegation in a bill of review, controverting the existence of the facts stated in the decree to have been found by the chancellor, except upon newly discovered testimony; and that inasmuch as in this case no facts are stated in the decree, nor other principles upon which it was made, it is insufficient and erroneous on its face and does furnish good ground for sustaining a bill of review. In 1st Harrison's Ch. Pr. 108, it is said that in drawing a decree, it is not held to be sufficient to recite therein the bill and answer, and then add, upon reading the proof, and hearing what was alleged on either side, it was decreed so and so, but that the facts which were proved and allowed, viz: alleged by the court to be proved, must be particularly mentioned in the decree. In the case of *Bonhan vs. Newcomb*, Vernon's Ch. Ca. 215, it was objected against a bill of review, that errors had been assigned, collected from the proofs in the cause that did not appear in the body of the decree. But the Lord Keeper observed, "that was occasioned by the ill way they had got of late in drawing up decrees in general, without particularly stating the matters of fact, and said, the plaintiff in

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the bill of review, should not be concluded by it, unless the matters of fact were particularly stated in the decree." In the case of *Broad vs. Broad*, 2 Ch. Ca. 161, it was contended that it was the course, and that an hundred decrees had been made so, that when it was said, "on reading the proof it is ordered," it is intended that the matters put in issue are proved. But it was said *a contra*, that a decree ought to be grounded on facts *ex facto jus oritur*, or else by the clerks course the defendant might be barred of a review in all cases, for the plaintiff in a bill of review cannot allege matter of fact contrary to what is stated in the decree to be proved, and it may be many issues are joined in the bill and answer. If this course should hold, all must be admitted, and no man can truly know on what fact or case the decree was made, nor any appeal brought.

The Lord North declared accordingly, and was clearly of opinion that it is not enough to say "on reading the proof it is decreed," but on reading the proofs it appeared thus and thus, and it is therefore decreed," &c. A strict examination of the rule as established by Lord Bacon will support this view of the case. It says: "No bill of review shall be admitted except it contain either error in matter of law, appearing in the body of the decree, without further examination of matters of fact, or some new matter, &c." The words without farther examination "of matters of fact," plainly admits that the matters of fact were to be examined into to a certain extent, to wit, as far as they are in the decree. Now if none are contained in it how can they be examined, and how can error be assigned therein. Furthermore the 13th rule regulating the practice of courts of chancery in this State, expressly requires that the facts shall be stated in the decree. We are therefore of opinion, that the decree originally given in this case, is erroneous on its face for not containing the facts on which it is founded, and that the chancellor committed no error in reviewing it on the bill of review.

The second question for examination is, as to the propriety of the relief given to the complainant on the review of his cause. That there was manifest error in the original settlement of the partnership between the parties, is so fully established by the

proof as not to be contradicted by the counsel for the defendant, this makes it unnecessary to go into an examination of the testimony. That a court of chancery has power to relieve against mistakes of this kind, to open the settlement, and if the money has not been paid to enjoin its collection, or if it have, to decree that it be refunded, is too well settled to be now contradicted. But it is argued that the complainants right to recover in this case is barred by lapse of time and the statute of limitations.

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This settlement was made in 1826; the money was paid in 1829, and the bill filed in 1830. It would be a very strong case to say, that under these circumstances the time permitted to elapse would form a bar, if the mistake had been innocently made on the part of the defendant, and he had afterwards not done any thing by which complainant was induced to delay filing his bill; but in this case the conduct of the defendant relative to the mistake, is suspicious, and he certainly did always when spoken to about it, promise to rectify it at any time when it should be ascertained to exist. That this course of conduct did cause the complainant to be less vigilant in enforcing his right than he otherwise would have been, cannot we think be denied. Statutes for the limitations of actions do not expressly apply to courts of chancery, but are by them enforced by analogy in all cases where the matter in controversy would have been barred in a court of law, could it have been there prosecuted. The object of this bill is to recover a sum of money alleged to have been paid by the complainant through a mistake to the defendant; analogous cases frequently arise at law. The action used for the purpose of enforcing them, may be either indebitatus assumpsit, or debt. The action of indebitatus assumpsit is barred in three years, but the action of debt not till six. Supposing then that the money charged to have been paid by mistake, be considered as having been paid at the time the settlement was made, and notes for the supposed balance executed, still six years did not elapse before this bill was filed, and as an action of debt would not at law have been barred, so neither will be this suit in equity. But if the money be considered only as having been paid in 1829, the time the notes were satisfied, not even

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the action of indebitatus assumpsit would be barred, so there is no pretence whatever for saying that the statute of limitations defeats complainants claim to the relief sought. What ought that to be? The matter has been referred to the clerk and master, who has made a report which has not been accepted to by the defendant. Why the amount therein specified should not be decreed to the complainants, we know not, and accordingly direct that it shall be so done.

Decree affirmed.

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A rehearing of a chancery cause decided in the supreme court upon appeal, cannot be allowed at a term subsequent to that at which the decree was rendered, although the cause was retained in court for the purpose of taking an account.

A pawnee or mortgagee of slaves, where he has possession, is subject to the same responsibilities and duties that exist in the case of a hirer.

A mortgagee who has possession of a slave is the owner of the slave for the time being; he must account for the hire of the slave, and must furnish, at his own cost, necessary food, raiment, and medical attendance when necessary.

The facts of this case are stated in the following opinions.

Geo. S. Yerger & J. Campbell, for complainant.

W. E. Anderson & W. Thompson, for defendant.

REESE, J. delivered the opinion of the court.

The complainant commenced this suit in the chancery court at Carthage, for the purpose of redeeming certain negroes conveyed by him to the defendants intestate by a bill of sale, absolute upon its face, but which complainant insisted should, under the circumstances, be deemed and adjudged a mortgage. The bill in the chancery court was dismissed, and the complainant appealed to the late court of error and appeals, held at Sparta. Upon the hearing of the cause, the decree of the chancellor, dismissing the bill, was reversed, the transactions of sale adjudged to be a mortgage,

the negroes ordered to be delivered to a receiver, and an account directed to be taken of the mortgage money due from the complainant, and of the hire due from the defendant. At the next term of the court of errors and appeals at Sparta, a petition for a rehearing was filed, for the purpose of producing a reversal of the decree of that court, and an affirmance of the decree in the chancery court; and the inquiry now is, ought this court to rehear the cause. The question is new, if not difficult, and relating to the power, the duty, and the course of proceeding of this court, in a matter final in its nature, it is certainly highly important, and has merited and received at our hands an attentive consideration.

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When this cause was heard by the late court of errors and appeals at Sparta, its jurisdiction, with reference to the case and in general, was appellate only. In our constitution recently framed, the jurisdiction of this court is declared to be "appellate only under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present supreme court." (Const. art. 6, sec. 2.) We have said that this question is new, but the contrary is supposed and urged by the counsel for the petitioner; they contend that the question was raised and determined in favor of the position they assume, in the case of *Craig & Edmonson vs. Buchanan*, 1 Yer. 142. Against the authority of that case, as resting upon its own peculiar circumstances, we are not prepared, nor is it necessary to object. We should have been as well satisfied with the case, certainly, if the court had acted on what we are informed in the case, were the first impressions of the able judge who delivered the opinion of the court. The difference is so marked between a court of *dernier resort* and one of original jurisdiction; and again, between the court of chancery in England, always at least in theory, open, and sitting for the transaction of business, and our court, whose power and jurisdiction over cases upon its docket is limited to its annual terms. And the course of the court and the mode of proceeding there and here so differ from each other, that the power to rehear in this court,

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or to refuse it, can hardly depend upon any analogy or want of analogy, between the act of 1801, c 6, § 42, 44, 45, or the proceedings under it, and the practice in England of enrolment in equity; indeed, there is no analogy between this court, as now constituted, whose jurisdiction is appellate only, and the court of chancery in England, whose jurisdiction is original as well as appellate. But the case in 1 Yer. 142, was not on appeal from the chancery to the supreme court, there never was any decree pronounced in the chancery court; it was heard as an original cause in the court of appeals. Much force is given to that circumstance in the opinion; it therefore differs from the case before the court.

In England, we are told, there are three modes by which a decree may be reversed; by a rehearing, by a bill of review, and by an appeal to the House of Lords. 1 New. Ch. 360. The rehearing and the bill of review are proceedings for reversal applicable to the court of chancery only; the appeal to their final judicature, the House of Lords, is considered a proceeding for reversal distinct from a rehearing; but an appeal from the master of the rolls, or the vice chancellor to the lord chancellor, is deemed and called a rehearing. If it were settled conclusively by authority, that a cause heard or even reheard before the master of the rolls, might be heard again, and even reheard before the chancellor, it would not prove, we think, or have any tendency to prove that therefore this court of appellate and final jurisdiction should rehear a cause decided at a previous term of the court. It is not pretended that this is ever done in the House of Lords, or in the court of appeals in New York; nor is any authority whatever produced to show that it is done in any jurisdiction which is both appellate and final. But if the mode of exercising the appellate and final jurisdiction of this court could be properly illustrated by the mode in which that of the chancellor in England is exercised, who possesses much appellate, much original, but no final jurisdiction; still the general rule there is, that after an appeal from the rolls to the lord chancellor, a rehearing before him will not be allowed; but if a cause is first heard at the rolls, and afterwards re-

heard there, it may afterwards be heard upon appeal to the lord chancellor. See 1 New. Ch. P. 363. The first part of the proposition, to wit, that a cause heard at the rolls, and upon appeal, heard by the chancellor, will not be reheard by the latter, is maintained in *E. India Comp. vs. Boddoue*, 13 Ves. 421; *Brown vs. Higgs*, 8 Ves. 561; 16 Ves. 214, 330. This has been regarded as a rule since the case of *For vs. Machreth*, reported 2 Co. 158. The second clause of the proposition, to wit, that a cause heard and reheard at the rolls, will be heard upon appeal to the chancellor, is proved by the case of *Blackburn vs. Jepson*, 2 Ves. & Beam. 358; but it has no tendency to prove that this cause should be reheard in this court; indeed, that such a question should have been raised before the lord chancellor, and discussed as one of difficulty by able counsel, and decided by Lord Eldon (chancellor) with hesitation, strikingly prove how little adapted are the course of proceeding and the jurisdiction of that court to illustrate the power and duty of this. What would that question have been in reference to this court, supposing it to represent the lord chancellor and the court of chancery, and the master of the rolls? It would have been, whether a case which has been heard in the chancery court, and upon petition for rehearing, reheard there, can be heard upon appeal in this court. The question could not be seriously asked, in reference to our system; not so, however, in England. *Blackburn and Jepson* was a case where the cause being heard at the rolls, a petition for rehearing as to part of the decree, touching an account of tithes, was presented at the rolls, and a petition of appeal to the lord chancellor against so much of the decree as directed issues to try the *modus*, &c. The cause in part was reheard at the rolls, and the decree affirmed. The defendants then presented a petition of appeal to the lord chancellor, as to that part of the decree which had been so reheard and affirmed; upon which petition an order was made by the lord chancellor, setting down the appeal, and the plaintiffs moved to discharge that order. This motion was supported by counsel upon the ground that an appeal is a rehearing, and that in *Brown vs. Higgs*, 8 Ves. 561, upon

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a full consideration of all the cases, it is settled as a rule, that but one rehearing is allowed. The other side allowed, that the case cited proved that no appeal would lie to the lord chancellor after a rehearing at the rolls. The greatest absurdity, they said, would follow such a rule so applied, making the lord chancellor a ministerial officer to enrol the decrees of a judge of inferior jurisdiction. The lord chancellor said, "Having read the case of *Brown vs. Higgs*, he could not refuse to hear this appeal, but under the circumstances it ought to be brought up with the other appeal." In this case the general rule is not controverted, but confirmed, that a case once heard at the rolls, and then before the lord chancellor, shall not be reheard by the latter. We are referred to the reign of Charles II, in the case of *James Noel vs. Robinson*, 1 Ver. 94, where the reporter in a loose note speaks of the cause having been three or four times heard before Nottingham and Jeffries. These may have been re-arguments; at all events it was long before the rule was authoritatively settled. The case of *Howel vs. Howel*, 1 Dickens, — in 1769, in a mere note, does state the adoption of a course contrary to the rule; the rule, however, we think well settled, but if it were not, that would make no difference, as we have said in this question, which cannot be made to turn upon that rule. The decree pronounced at Sparta in this case was a final decree in the sense used in England and New York, 17 J. R. 548; 12 J. R. 500; 1 New. Ch. 322. It was *res judicata*, when the petition was filed and beyond the control of the court as much as if no account had been ordered, nor any other step directed to be taken, merely in execution of the decree. When this petition was filed, the court had no more power over the decree of the last term, than if that decree had been one dismissing the bill. The retention of the cause in court, for the purpose of carrying the decree into execution, gave the court, at a subsequent term, no more control over the decree itself than if the case had been sent down to the chancery court for the execution of the decree. The supreme court of the United States, whose jurisdiction is appellate, has long settled, that when their

mandate issues to the circuit court, to carry a decree of theirs into execution, they upon appeal from subsequent proceedings have no power over their original decree in the cause, it is *res judicata*. 5 Cranch, 313, 316, 317; 10 Wheaton, 439, 442, 3, 4.

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Indeed such a decree, as was rendered in this cause at Sparta, a decree which settled the facts and principles establishing the rights of the parties, and which declared those rights could not have been reheard, upon a petition filed at a subsequent term, if it had been made in the chancery court. We do not mean that the rules adopted by the chancellors prevented this, but that before these rules, and independently of them, it was so upon principle and authority. If, as is said in 1 Yer. 142, a different practice prevailed, that practice must have been founded upon a mistake of the term "final decree," taking them to mean the last order in the case. Such practice, even in the chancery court would involve the absurd necessity of actually rehearing the cause in order to determine the preliminary question, whether a rehearing would be granted.

Upon the whole we are very clear that the decree at Sparta is *res judicata*, that we have no power over it, and cannot grant a rehearing.

After the motion for a rehearing had been disposed of, the court took up the case upon exceptions to the report of the clerk and master. The defendant, Lawrence, was the executor of Bigelow, the mortgagee. After Bigelow's death, he gave bond and security, and took the negroes into possession, and held them in possession ever since. The clerk and master, after charging him with hire, &c. allowed an account for medical services and attention to the slaves whilst in the possession of the mortgagee in his life time, and also whilst in possession of his executor. To this exception was taken by the complainant, and is the third exception alluded to in the subsequent opinion. There were several other exceptions which it is unnecessary to notice. The opinion on this point was delivered by

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v
Bigelow.

GREEN, J.

The third exception of complainant is sustained.

The medical account of Dr. Wm. P. Lawrence cannot be allowed. The decree settles the right of the parties and directed the commissioner to take the negroes into his possession, until the defendant should give bond and security for their forthcoming. The executor of Bigelow, after his death, gave bond and security and took the negroes into possession,, and has retained them ever since. If he had hired them out, the persons hiring them would have been obliged to pay for medical services rendered to them; surely then he cannot upon any principle, by keeping them himself, make Overton responsible for the medical services rendered to them, at the same time that he is only charged such hire as he might have obtained from others. This would have been the plain course of equity in this case, independently of any principle regulating the duties and responsibilities of mortgagees of slaves generally. But in the case of *Young vs. Henderson & Forgey*, 4 Hay. Rep. 10; it is decided that a pawnee or mortgagee of a negro is subject to the same responsibilities and duties that exist in the case of a hirer. He is, say the court, the temporary owner, and his responsibilities and duties for the time he so holds him, are the same as those that devolve upon the general owner.

This doctrine the court thinks is essential to secure the slave in needful food and raiment for his preservation, and to prevent cruelties, which may force him to absent himself, so that he may be lost to the general owner; certainly, a mortgagee in accounting for the hire of a mortgaged slave is never charged a larger sum than could be procured for the slave, by a contract which would create upon the part of the hirer all these duties and responsibilities, and it is difficult to perceive any reason why the mortgagee should not be held to their performance.

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There are only three grounds for which a decree can be reversed upon a bill of review. 1st. For error apparent on the face of the decree, 2nd. For new matter which hath arisen in time after the decree. And 3rd. Where proof hath come to light since the decree, and could not possibly have been used at the time when the decree was rendered.

To authorise a bill of review for new matter which hath "arisen in time after the decree," it must be matter which was in existence at the time the decree was rendered, but was not known to the party until afterwards.

The rendition of a decree in another court, is not "new matter" within the meaning of the rule.

A died leaving three heirs and possessed of three tracts of land, one for 4000 acres, one for 500 acres, and one for 506 acres. B, one of the heirs, before a partition, sold the 500 acre tract to C, and executed his individual bond. C filed a bill for a partition. The court made an equal division of the whole and assigned to C the 500 acres sold to him, deducting it out of the share of B. Whilst this suit was pending and before the decree was pronounced, a bill was filed by D in another court for a specific performance of a contract made by the ancestor A, in which a decree was rendered about a week after the first decree, for 2280 acres in favor of D, which was allotted to him out of the 4000 acre tract. This produced an inequality in the first division, made under the first decree, to correct which a bill of review was filed: Held, that it would not lie.

The facts of this case are stated in the opinion of the court.

for complainant.

for defendant.

TURLEY, J., delivered the opinion of the court.

This is a bill filed by the complainants to review a decree of the chancery court given in favor of the defendant at Columbia, in September 1832, under the following circumstances. Anthony Bledson died possessed of 5000 acres of land, to wit: one tract for 4000, one for 506 acres, and one for 500 acres, leaving three sons, Abraham, Isaac and Henry his heirs at law. In the year 1822, Henry sold the 500 acre tract to Anderson B. Carr, and executed his individual bond for title, there having been no partition between said heirs at law. Abraham and Henry afterwards died leaving a number of children. In the year 1825, Anderson B. Carr filed his bill against Isaac Bledson and the heirs of his brothers, Abraham and Henry, for a partition of the lands and for a specific perform-

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ance of his contract with Henry, and upon the report of commissioners appointed by the court, the land was partitioned, allotting to Abraham Bledsoe's heirs the 506 acre tract and 1400 acres out of the 4000 acre tract, to Isaac Bledsoe 2378 of the 4000 acre tract, and to Henry Bledsoe's heirs the 500 acre tract and 222 acres of the 4000 acre tract, and by the decree the title to the 500 acre tract was divested out of the heirs of Henry Bledsoe and vested in Anderson B. Carr. After the Bill was filed by Anderson B. Carr for a partition of the lands and a specific execution of his contract with Henry Bledsoe, and before the decree was rendered therein, a bill was filed in the circuit court of Sumner county against the heirs at law of the said Anthony Bledsoe by Olive Bradley, for a specific execution of a contract made by said Bledsoe with one Nathaniel Henderson, in the year 1784, for a conveyance of a portion of said above described lands, which was so prosecuted, that at the September term of said court and one week after the decree had been rendered in the chancery court at Columbia, in favor of Anderson B. Carr, a decree was pronounced in favor of Bradley for 2280 acres of the land and which was allotted to him out of the 4000 acre tract. This produced an inequality in the division as made by the chancery court, and to correct which this bill of review is filed. The question for the consideration of the court is, whether under this state of facts the chancellor ought to have reversed the cause and have made a new partition of the lands.

The authority of a court of chancery to review its decrees rests on the order of Lord Bacon. Previous to its establishment, decrees after enrolment were as obligatory and as finally binding, as judgments at law after an adjournment of the term at which they were rendered. Upon the construction of this order then, the question under consideration must of necessity rest.

This order provides that, "no decree shall be reversed or explained, being once enrolled, but upon bill of review, and no bill of review shall be admitted except it be upon error in law, appearing in the body of the decree, without further examination of matters of fact, or he shall show some new matter

which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made." "Nevertheless, upon new proof which hath come to light since and after the decree made and could not possibly have been used at the time when the decree passed, a bill of review may be granted by the special leave of the court, but not otherwise."

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It may be well to premise that an enrolment of a decree in England and an adjournment of a term of court at which one may have been given in this State, are here to be considered as synonymous terms, from which under the ordinance quoted it follows, that after a decree has been pronounced and the court has adjourned, it can only be "reversed or explained" by bill of review. The order of Lord Bacon recognises three causes for reviewing a decree. 1st, Error apparent in the body of the decree. 2nd, New matter which hath arisen in time after the decree. And 3rd, Where proof hath come to light since the decree and could not possibly have been used at the time when the decree passed. It is not pretended that this bill of review can be sustained under the first or third provisions of the ordinance, but it is urged, and with plausibility, that it can be under the second. The merits of the question depend on the construction to be given to the word "arisen." For the complainants it is argued to mean new matter which has come into existence after the decree in the original cause; whilst for the defendant it is said to mean matter which was in *esse* at the time the decree was given, but which was not in the knowledge of the party claiming the benefit of it by a bill of review. If this were a new question we might feel embarrassed by it, for perhaps in common parlance, the word "arisen" as used in Lord Bacon's ordinance would be understood to mean what is contended for by the counsel for the complainants; but the court is relieved from this difficulty by the construction which has been given to it by well considered authorities. In the case of *Sir Thomas Standert vs. Radley*, determined in 1741, and reported in 2 Atk. 177, Lord Hardwick in discussing this subject says: "The rule to review and revise a former decree is the discovery of new

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at the time, but was not known to the party until afterwards."

And in the case of *Goatside vs. Isherwood*, determined in 1783, and reported in Dicken's Cha. Rep. 612, it is stated by John Dickens, at that time senior register of the court of chancery, to whom the matter was referred by Lord Commissioner Loughborough, "that where a discovery hath been made since a decree of matter or a fact in *essee* at the time of pronouncing it, the party must apply for leave to file a bill to bring it before the court, and the court will require to be satisfied that the matter alleged to be newly discovered was not at the time of the hearing, in the knowledge either of the party or his solicitor or agent," and with this opinion the Lord Loughborough and the whole court were satisfied.

These two cases must be considered as settling this question, and as we think clearly right on principle. If the construction of this rule of Lord Bacon's as contended for by the complainants were given, it is apparent that cases in chancery would frequently be almost interminable. In the case now under consideration, no one disputes but that the facts sought to be set up by the bill of review were in *essee* at the time the original decree was rendered, and were fully within the knowledge of the complainants; but it is argued that the decree of the circuit court which produced an inequality in the partition, had not been given, and it is sought to make it and not the facts upon which it was founded the newly discovered matter. This will not do, because: 1st. A decree is not new matter within the meaning of the rule, it is a legal adjudication of the rights of the parties upon the matter charged in the bill. And 2nd. If this were not so and it could be considered as matter, then it was not in *essee* at the time the original decree was rendered, and therefore under the authorities above cited, cannot be made the ground of a bill of review. We are therefore of opinion that there is no error in the decision of the chancellor dismissing the bill, and affirm the decree.

Decree affirmed.

JONES' HEIRS *vs.* PERRY, *et al.*NASHVILLE,
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The act of 1825, ch. 154, which authorized the guardians of the minor heirs of John Jones, deceased, to sell four hundred and fifty acres of land descended to said heirs from their said ancestor, John Jones, and the proceeds of the sale of said lands to be applied to the payment of the debts created by said John Jones in his life time, although the act might have been passed with the assent of the *minor heirs*, is unconstitutional and void.

The provisions of the constitution of Tennessee (article 5, section 1.) prohibit to the legislature the exercise of judicial power. The whole judicial power of the state being expressly vested in the courts by the constitution, the exercise of it by the legislature transcends the power entrusted to it by the constitution, and cannot be legally carried into effect.

An act of the legislature directing the real estate of certain minors therein mentioned, to be sold by their guardians, and the proceeds to be applied to the payment of their ancestor's debt, is *judicial* in its character. It is in form a law, but in substance and effect it is a judicial decree, directing and authorizing the lands of minors to be sold to satisfy debts alleged to be due from their ancestors.

The term "law of the land" in the constitution of Tennessee, means a general and public law, operating equally upon every member of the community,

Where the bill specially interrogates the defendants as to particular facts, (denied by the bill to exist,) and seeks a discovery from them, an answer responsive to those interrogatories, and stating affirmatively that the facts do exist, is evidence for the defendants.

A party, who is in possession of land for seven years, holding adversely, under and by virtue of an unregistered deed, is protected by the second section of the act of 1819, to the extent of the boundaries of his deed.

A court of equity has the power to order a deed, bond or other instrument to be delivered up and cancelled, if the same is void, whether it appear to be void on the face of the instrument or otherwise.

A court of equity having jurisdiction to declare a deed void, and order the same to be cancelled, will retain the cause until the whole matter is disposed and the rights of the parties settled.

Where defendants took possession of land, under a void deed, believing however that they had title, they will be allowed for any valuable and permanent improvements they may have made, provided, they do not exceed the amount of rents and profits for which they are chargeable.

John Jones died in 1822, seized of a large real estate, also possessed of a personal estate not sufficient to pay his debts. The complainants are his heirs. His wife and oldest son, Alexander S. Jones, administered on his estate. The mother of complainants and their uncle, David L. Jones, were appointed their guardians, they being minors.

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In 1825, the legislature upon the application of the guardians, with the approbation of the minors, passed an act, authorizing said guardians to sell 450 acres of land, on which said John Jones resided at his death, in the best manner they could for the interest of complainants, and the proceeds were declared to be assets in their hands for the payment of the debts of their ancestor.

Defendants, David and Thomas Steel, held notes on John Jones for about \$6000, upon which suits had been brought and were pending at the passage of this act. The guardians advertised the land and sold it on the 18th of May, 1826, at public auction, for \$14 or \$15 per acre, amounting to about the sum of Steels' debts. The Steels purchased the land, and at the succeeding court the administrators confessed judgments on the notes and the Steels acknowledged satisfaction of the judgments in consideration of the land purchased by them. The guardians made a deed and the Steels took possession and sold to defendant, Perry, and Perry sold to defendant, Wheeler.

All other facts necessary to a correct understanding of this case, and of the questions decided by the court, are stated in the opinion of the court.

The chancellor granted the relief asked for in the bill, he declared the act of 1825 unconstitutional, and decreed an account to be taken, &c. from which decree an appeal was taken to this court.

A. Wright, for complainants. 1. The sale of the tract of land in dispute was wholly unauthorized by the general and public laws of the land. 2 Cruise's Digest, 45, 46, 50: 2 Ba. Ab. 685, 686: *Boyd vs. Armstrong*, 1 Yer. Rep. 40: *Mary Gilman vs. Tisdale's heirs*, 1 Yer. Rep. 285; *Neal vs. McCombs*, 2 Yer. Rep. 10: *Peck vs. Wheaton's heirs*, Mar. & Yer. Rep. 353: 3 Hay. Rep. 116, 117, 300: 4 Yer. Rep. 10.

The confession of judgments by the personal representatives of John Jones is an admission of assets and discharges the realty. *Erving et. al. executors of J. Erving, vs. Peters*, 3 T. R. 686: 1 Sal. 310; 1 Lord Raym. 587: 3 Ba.

Ab. 87 : (M) note c; 1 Sell. Pr. 378. They could not be relieved in equity. 1 Vern. 119: 2 Vern. 325.

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After the personal estate has been wasted, and many of the debts of the estate barred by the statute of 1789, c 23, § 4, *vide Parker vs. Stephens*, 1 Haywood's Rep. 229: 3 Ba. Ab. Ex. & Ad. L.: 3 Yer. Rep. 1, 318, 395, 431: 5 Hay. Rep. 240: 2 Yer. Rep. 18; it is asked to sustain a sale of the inheritance of the heir to pay these very debts. This cannot be legally done. *Peck vs. Wheaton's heirs*, Mar. & Yer. Rep. 353.

2. A guardian by virtue of his office and title of guardian merely has no power to sell absolutely the real estate of his ward. 4 Cruise's Digest, (title deed, c 5,) 73: *Wade vs. Baker*, 1 L. Raym. 131: *The King vs. Oakley*, 10 East. 494: 2 Thomas Coke, 349: 3 Ba. Ab. 418: Acts of 1762, § 13, 14: 5 Hayw. Rep. 292: 3 Yer. Rep. 336: 7 Johns. Ch. Rep. 154: 1 Johns. Ch. Rep. 561: 5 Johns. Rep. 66. He can only lease it. The aid of a court of chancery is always requisite to enable him to sell absolutely. 2 Vern. 436: 6 Ves. 6; 3 John. Ch. Rep. 347, 348, 370.

3. This sale must therefore rest for its validity upon the private statute of 1825, c 154. The nature of this act of assembly and the circumstances under which it was passed, aside from any constitutional objection, are sufficient to invalidate the proceedings under it. Private statutes, for the purposes of conveying property from man to man have always been regarded with jealousy. 5 Cruise's Digest, 1, 2, 6, 7, 8: *Jackson vs. Catlin*, 2 Johns. Rep. 262, 263: *Jackson ex dem, Cooper et. al. vs. Cary*, 8 Johns. Rep. 385. The doctrine of *suppressio veri* or *suggestio falsi*, has been held to apply, and a private statute when obtained through fraud or misrepresentation will be relieved against in a court of chancery. 5 Cruise's Digest, 27, 28, 30: 2 Bl. Com. 346.

4. But this act of assembly is unconstitutional and void, and conferred no power of sale upon the guardian. It is not the law of the land. 2 Blac. Com. 44. *Vanzant vs. Waddell*, 2 Yer. Rep. 260: *Wally's heirs vs Kennedy*, 2 Yer. Rep. 554: *Bank of the State vs. Charles Cooper, et. al.*,

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2 Yer. Rep. 600: *Tat's executors vs. Bell*, 4 Yer. Rep. 202; *Officer vs. Young*, 5 Yer. Rep. 320. If the state had no title, she can communicate none under the act. Her title only passes. 2 Johns. Rep. 243; 8 Johns. Rep. 387: *Fletcher vs. Peck*, 6 Cranch's Rep. 87: *Culder et ux. vs. Bull et ux.*, 3 Dallas Rep. 386: 2 Dallas Rep. 310. Private property may be taken for public use upon full compensation being made; but private property can in no instance be ~~taken for~~ private use, however ample the compensation, without the consent of the owner. *The People vs. Platt, et. al.*, 17 Johns. Rep. 195: *Bradshaw vs. Rodgers & Magee*, 20 Johns. Rep. 103: *Harding vs. Goodlett*, 3 Yer. Rep. 41.

5. The statute of limitations is not in the way of a recovery of this land by the complainants. When the adverse possession began, Jane R. White was both an infant and *feme covert*, and can therefore avail herself of both disabilities. *Stewart vs. Mellish*, 2 Atk. 610: Angell, 151; 3 Johns. Ch. Rep. 135. Infancy saves the rights of Mrs. Dickason, *Barrow's lessee vs. Nave*, 2 Yer. Rep. 227. As to John R. B. Jones, there is no proof of seven years continued adverse possession, without which there can be no bar. Angell, 71, 72, 73, 74, 82; 12 Johns. Rep. 365: 4 Mass. 416; 15 Mass. 495: 2 Johns. Rep. 230: 1 Hay. Rep. 180, 249, 320, 321, 250. The rule is, that it must be shown clearly by the defendant that such an adverse possession has existed as the statute requires for the period of time fixed by law. The law infers nothing in his favor. 3 Yer. Rep. 60, 397, 402: 2 Johns. Rep. 232: 9 Johns. Rep. 167. The defence of the statute of limitations insisted on in the answers, is not evidence of the fact of possession, as is not responsive to any allegation in the bill, but is in avoidance of the title of the complainants. *Napier vs. Elam, et. al.*, 6 Yer. Rep. 113: 2 Johns. Ch. Rep. 89, and authorities there cited.

The first section of the act of 1819, can in no event apply to this case. The deed from David L. and Rebecca Jones was not registered until within seven years before the filing of this bill. That section provides for the case only

where any person shall have had seven years adverse possession of any lands, &c. holding or claiming the same by virtue of a deed or deeds of conveyance, &c. purporting to convey an estate in fee simple. 3 Yer. Rep. 397. Now a deed of conveyance, until registered, neither conveys nor purports to convey an estate in fee simple. 2 Tenn. Rep. 48, 264; 3 Hay. Rep. 4; 4 Hay. Rep. 192; Cooke's Rep. 119, 254; 3 Yer. Rep. 346. The object of registration is notoriety, after which all interested might easily know the extent and bounds of the adverse claim. 3 Hayw. Rep. 4. The case of *Dyche vs. Goss*, reported in 3 Yer. Rep. 397, is conclusive upon this question.

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The second section of the act of 1819 is equally without operation in this case. To have made out adverse possession under this section, the defendants must have shown a substantial enclosure, and an actual occupancy to the whole extent of that enclosure, for the period of time fixed by law, and then they could only defend to the extent thus possessed. 3 Yer. Rep. 397. If this were not so, there would be nothing to indicate the extent of their possession, and they might claim without bounds or limits. Angell, 75; *Brant vs. Ogden*, 1 Johns. Rep. 156; *Dee vs. Campbell*, 10 Johns. Rep. 475. But this proof is not furnished, and of course there is no protection as to any part of this land.

There is no pretext for saying there was an adverse possession of this land until January, 1827, when Perry moved there. The widow had no estate in the lands of her husband till dower was assigned her. 1 Cruise's Digest, 178; 1 Thomas, Coke, 584; *Clark vs. O'Donaghy*, 7 Johns. Rep. 246. Her possession, therefore, must be presumed to have been for the heir, and in subordination to his title, unless it were clearly and distinctly shown that she held adverse to him by a possession visible and notorious. 7 Johns. Rep. 246; Angell, 72, 73, 74, 81, 82.

Again, the heirs had actual possession of the land with the widow, and where there is a concurrent possession of the land, the seizin or possession will be adjudged in him who has the right. Adams on Ej. 54; 1 Sal. 240; 4 Hay. Rep. 174, 177; 4 Wheat. 213; 3 Mass. 215; 10 Mass.

NASHVILLE, 146, *Green vs. Lister, et. al.*, 8 Cranch Rep. 229. Again,
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the widow was the guardian of the heirs, and being an express trustee for them the act had no operation. Angell, 133; 2 Merivale, 360: 8 East. 315: 3 Johns. Ch. Rep. 190, 334: 17 Ves. 88: *Armstrong vs. Campbell*, 3 Yer. Rep. 236: 5 Hayw. Rep. 292, 293.

6. The jurisdiction of this court to grant the relief sought is not open to question. It has the power to declare the deed of the adversary void, and remove the cloud resting upon the title of the true owner. *Johnson vs. Cooper & Crosswhite*, 2 Yer. Rep. 524: *Benzein, et. al. vs. Lenoir, et. al.*, 1 Dev. Eq. Rep. 261, 262. Again, if a stranger enter upon the lands of an infant, he may be charged as his guardian or bailiff, and made to account in chancery as a trustee. 3 Atk. 130: 3 Ba. Ab 419, title guardian I, *Nelson vs. Allen & Harris*, 1 Yer. Rep. 371.

7. The complainants are entitled to a recovery without paying the debt for which this land was sold. "The object of the act, (1784,) was to exhaust in the first place the personal property in payment of the debts. No liability rests upon the heir until this is legally ascertained." The debt is no debt of his. 1 Yer. Rep. 40: 2 Yer. Rep. 397: Mar. & Yerg. Rep. 354: 4 Yer. Rep. 14. If the heir in this instance was forced to pay this debt, before he were permitted to recover his inheritance, nothing would be more easy in all cases, than for the creditor to get the land without touching or looking after the personal estate. If when once in possession, however defective his title, the heir could not force him out until his debt was paid, how strong the temptation and how easy the means to attain his object. I admit that there are many cases in the books where a court of equity will not order deeds and other void instruments to be delivered up unless upon terms. 1 Mad. Ch. Pr. 224. *Bromley vs. Holland*, 15 Ves. 618: *Underhill vs. Harward*, 10 Ves. 218: *Byrn vs. Vivian*, 5 Ves. 607: *Hoffman vs. Cook*, 5 Ves. 623: *Halbrook vs. Sharpey*, 9 Ves. 131. In all these cases the complainants really and *bona fide* owed the defendants, or some of them, a debt or duty, and equity and good conscience required its payment before the court

interfered in behalf of the complainant. But there are many cases where a court of equity will order deeds to be delivered up unconditionally and without terms. *Jackson vs. Mitchell*, 13 Ves. 581; *Newman vs. Millner*, 2 Ves. jr. 483. Such is the law in every case where the complainant owes no debt or duty to the defendant, and where his conscience is not affected: 1 Johns. Ch. Rep. 517. If the ancestor owes two debts, one by bond, in which the heir is not expressly bound, and the other by simple contract, having mortgaged his estate for a third, and dies, his heir may redeem, without being obliged to pay the two debts not secured in the mortgage, because such debts were not his. *Shuttleworth vs. Laycock*, 1 Vern. 244. This case is in point. So in the case of copyhold estates, when there is a judgment, it cannot be tacked against the heir, copyholds not being liable to execution: 2 Eq. Ca. Ab. 226.

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8. The decree of the chancellor is erroneous in ordering that neither the heirs or personal representatives of John Jones shall be permitted to plead the statute of limitations in any suit hereafter to be brought for the recovery of the debt for which the land was sold. The personal representatives of John Jones are not parties to this suit, and of course the decree as to them is a mere nullity. The statute of limitations does not except out of its operation a case like this, and where the statute makes no exception the court can make none. *Patton vs. McClure*, Mar. & Yer. Rep. 345: Cooke's Rep. 176. There is no analogy between this case and the case of *Love vs. White and Cox*, reported in 4 Hay. Rep. 210, and the case in Vernon's Reports there cited. But even these cases are not law. The weight of authority is the other way. 1 Vern. 73, 74: 2 Vern. 503: *Peers vs. Bellamy*, 2 Vern. 503, (note): *Lake vs. Hays*, 1 Atk. 281: 2 Atk. 1, 15, 615: *Baker vs. Prichard*, 2 Atk. 389. The heirs of John Jones have been guilty of no *iniquity* or *fraud*, nor have they had any agency, even the most remote, in causing delay in the prosecution of this debt; and even if they had, it is a mistake to suppose a court of equity can relieve against the positive provisions of a statute. *Walker vs. Smith*, 8 Yer. Rep. 238, 240.

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9. If any mistake was committed in the sale of this land, and in the entry of satisfaction upon the records of the county court, it was a mistake in law, and cannot be corrected. *Hubbard vs. Martin*, 8 Yer. Rep. 478. It is undeniably true, that the parties had all the facts before them, and were ignorant of nothing but the law. But if it were a mistake, subject to correction, it can only be at the instance of the personal representatives of David and Thomas Steel, against the personal representatives of John Jones. The heirs are not proper parties to such a bill. A defendant can never assume the attitude of a complainant, and especially so when he has no interest in the demand. 3 Yer. Rep. 82. But suppose the entry of satisfaction upon the records was erased, yet the confessions of judgments by the personal representatives of Jones, fixes them with personal assets, and the land can never be sold so long as this is the case. Mar. & Yer. Rep. 353. From this they cannot escape. 1 Vern. 119: 2 Vern. 325.

10. The complainants are entitled to an account for the rents and profits of this land from the 1st of January, 1827, up to this time. *Nelson vs. Allen and Harris*, 1 Yer. Rep. 361. They are not bound to pay for the improvements made upon the land. The counsel here cited and commented on 2 Kent Com. 334, 335: *Frear vs. Hardenbergh*, 5 Johns. Rep. 271: *Nelson vs. Allen and Harris*, 1 Yer. Rep. 366, 368: *Craig vs. Leiper*, 2 Yer. Rep. 196: 3 Atk. 134: Acts of 1797, c 43: 1805, c 42: 1813, c [24: 1815, c 122: 1824, c 8: 1 Yer. Rep. 386, (note): *Bristoe vs. Evans and McCampbell*, 2 Tenn. Rep. 341: *Townsend vs. Ship's heirs*, Cooke's Rep. 294: *Green vs. Biddle*, 8 Wheaton's Rep. 1. The law is and should be, that no man shall intermeddle with property, which common diligence and prudence teach him is not his own, without the consent of the owner. 2 Kent. Com. 338.

Wm. E. Anderson, for defendants. The objection to the sale of the land and the act of the legislature under which it was sold, is founded on the 8th section of the bill of rights, "that no freeman shall be deprived of his freehold or deprived of his property but by the law of the land;" and also upon the

20th section, "that no retrospective law or law impairing the obligation of contracts shall be passed by the legislature."

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By the "law of the land," real estate is subjected to the payment of debts. This is an incident attached to the property so soon as the debt is contracted, and it descends to the heirs, *cum onere*.

The land in the heirs of Jones was liable to pay Steel's debts, but certain forms or proceedings were to be pursued before it could be sold. These forms or proceedings are the remedies prescribed by law, and the simple question is, whether the legislature have the power to alter or give a new and different remedy to obtain satisfaction of a debt. If they have such powers, then it necessarily follows that the act of 1825 is not in conflict with the constitution, as it only provides a new and different remedy, and for the Steels to have satisfaction of their debt against Jones' estate.

It is well settled in this State, that in regard to remedies to enforce existing rights, the legislature have perfect and absolute control. *Townsend vs. Townsend*, Peck's Rep. 1: *Hope vs. Johnson*, 2 Yer. Rep. 123: *Vanzant vs. Waddle*, 2 Yer. Rep. 260: *Fisher's Negroes vs. Dabbs*, 6 Yer. Rep. 119.

2nd. The legislature may by a general law say that land shall be subjected in the first instance to the payment of debts, or they may dispense with the *scire facias* against the heir, and subject the lands to sale upon a judgment against the personal representative, or they may empower the personal representative to sell the land in order to pay debts, &c. If the lands in the hands of the heir may be sold and his title divested to pay debts, by the joint action of the court, the clerk and and the sheriff, why may not the legislature substitute the action of a guardian, or empower him upon the establishment of a debt against the personal representative, to sell the land for its satisfaction. (Here the counsel went into a full and elaborate investigation of the powers of the legislature to pass a private law, authorising lands in a particular case to be sold to pay a debt which has been judicially established by judgments. He also commented upon and examined the cases of *Bank vs. Cooper's securities*, 2 Yer. Rep. 600: *Wally's heirs vs.*

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Kennedy, 2 Yer. Rep. 554: *Tate's executors vs. Bell*, 4 Yer. Rep. 202. He concluded that these cases were reconcilable with *Hope vs. Johnson*, 2 Yer. Rep. 123: *Vanzant vs. Waddle*, 2 Yer. Rep. 260; and *Fisher's Negroes vs. Dabbs*, 6 Yer. Rep. 119, which latter cases he insisted, clearly established that a law might be special or applicable only to an individual case so far as the remedy was concerned, and yet be constitutional.

3rd. But the law in question has been settled in similar cases to be clearly constitutional, and the reasoning employed to sustain the law is clear and unanswerable. *Wilkinson vs. Leland*, 2 Peter's Rep. 657, is an authority directly in point. *Vide also Rice vs. Parkman*, 16 Mass. Rep. 326: 10 American Jurist, 297: *Williams vs. Norris*, 12 Wheaton's Rep. 117, 128. *Storrs vs. Pease*, 8 Conn. Rep. 541.

4th. The minors in this case were of an age to know what was doing and were consulted. They had sufficient judgment and discretion to know that the land descended to them was about to be sold to pay their father's debt. They knew and assented to it; and although the law protects a minor against his own indiscretion in contracting, yet it holds him responsible for fraud. The infants here stood by and permitted the sale to proceed, no objection was made by them, and it would now be a fraud to permit them to assert their title in a court of equity. 1 Fonblanque's Eq. 77, note z, edition of 1831: 12 Pickering's Rep.

The act of limitation protects the defendants. On this point the answer is responsive to the bill, and from that it appears that the defendants have been more than seven years in possession under their deeds. True the deeds were not registered within seven years, nor was this necessary. Possession by deed is all that the 1st section of the act of 1819 requires, and possession under an unregistered deed is a color of title sufficient to protect under the operation of the act of limitations. *Doe vs. McArthur*, 2 Hawks Rep. 33.

But be this as it may, the case is clearly embraced by the second section of the act of 1819, c. 28

J. W. Combs, argued on the same side.

GREEN J. delivered the opinion of the court.

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The first and principal question to be considered in this case is, as to the constitutionality of the act of the legislature, under which the defendants claim title. The act of 1825, c 154 enacted upon the application of the guardians of the complainants, authorised said guardians to sell the tract of land in controversy for the purpose of raising a fund to pay the debts of complainant's ancestor. In pursuance of its provisions they proceeded to sell the land on the 18th day of May, 1826, to David and Thomas Steel, to whom a conveyance was made. The Steels sold to James Perry, who took possession of the premises and who has since sold to James W. Wheeler. The bill prays that the deed to the Steels may be delivered up to be cancelled, that the possession of the land may be delivered to complainants, and that defendants account for the rents and profits of the land since they have had possession of it.

It is contended this act of assembly is unconstitutional. 1st. Because it is an exercise of judicial authority, and 2d, because it deprives the complainants of their property without the judgment of their peers, or the operation of the law of the land. It is clear that the legislature of this State cannot rightfully exercise a judicial power. By the constitution (at the time this act was passed,) it is provided in art. 5, § 1, "that the judicial power of the State shall be vested in such superior and inferior courts of law and equity, as the legislature shall from time to time direct and establish." Here the whole of the judicial power of the State having been vested in the courts, the assumption of any such power by the legislature would encroach upon the jurisdiction of another co-ordinate department of the government, would transcend the powers entrusted to it, and would consequently be unconstitutional, and the act would be void. The question then recurs, is the act under consideration of a judicial character? It does not partake of the character of a law, for it forms no rule of action of that permanent, uniform and universal character which Blackstone in his commentaries, vol. 1, page 1, says constitute the fundamental principles of municipal law. What is it then but a judicial decree? It was enacted upon the avowed

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What does it do then but adjudge the existence of the debts, and decree that the lands be sold for their payment. It is, to be sure, in form a law, but we are unable to see how it differs in substance from a judicial decree, and if it is in substance a judicial decree, the form in which its makers have thought proper to clothe it, cannot alter its character.

The legislature cannot sit in judgment, try causes and apply the rules of law to them, make decrees, and much less can they make decrees in the exercise of an arbitrary power, independent of and in opposition to the rules of law. It is difficult to perceive how an act which determines that the property of a party is liable for a given debt, and that it be sold for the payment of that debt, is not a judicial act; and yet in substance that is the case before us. It is true, the sale is authorised for the payment of debts generally, but that can make no difference as to its judicial character. It is the same thing in principle whether there be ten creditors or only one. We are aware that the supreme court of the United States, in the case of *Wilkinson vs. Leland*, 2 Peters' R. 627, and the supreme court of Massachusetts in the case of *Rice vs. Parkman*, 16 Mass. R. 326, in deciding upon acts somewhat similar, determined that those acts were no encroachment upon the judicial power. But it is to be observed as to the case of *Wilkinson vs. Leland*, that the law whose constitutionality was involved, was an act of the legislature of Rhode Island. This State has no constitution, but is governed altogether by the charter of Charles II. In the argument of the case, Mr. Wirt put the power upon the ground that there was no constitutional restriction to legislative action. "Is it necessary," said he, "to show the authority? The authority is that of the people." Judge Story, who delivered the opinion of the court, enters into no reasoning upon the subject. He says: "We do not think that the act is to be considered as a judicial act, but as an exercise of legislation. It purports to be a legislative resolution and not a decree." Now if this is the best reason which can be given why it was not a judicial act, with deference to the able judge who advances it, the opinion ought to have very little weight. If by making an act of this

kind purport to be a legislative resolve, it thereby becomes a legislative and not a judicial act; all judicial power might be usurped by the legislature and exercised constitutionally in the form of legislative resolves. In the case of *Rice vs. Parkman*, chief justice Parker puts it upon the ground that it was not a question in which different parties were interested, nor was it a decree affecting the title to the property. The only object of the legislature in that case was to grant the authority to transmute real into personal property for purposes beneficial to the owner. This view of the case, though constituting a broad distinction between that and the present case, is hardly satisfactory. For although usually there are two parties in each judicial proceeding, yet this is not always the case. An inquisition of lunacy and the appointment of a committee, is a case of this kind, yet in such case there is an exercise of judicial power and discretion. But in the case before the court there were two parties; there were parties to the debts which were assumed to exist, and parties to the sale which was authorized to be made.

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We are next to consider whether this act of assembly is the "law of the land." By the eighth section of the bill of rights it is declared "that no freeman shall be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Lord Coke in his commentary upon Magna Charta, 2 Institute, 51, in defining the meaning of the phrase "law of the land," says: "That the law might extend to all, it is said *per legem terrae*, by the law of the land," By this court, in many cases these terms "law of the land," are defined to mean a general and public law, operating equally upon every member of the community.

It is however contended, that this provision of the constitution was not intended to apply to a case like the present, but was intended to prevent majorities in times of high political excitement from passing partial laws, whereby to create forfeitures of estates and otherwise to destroy obnoxious individuals. It is true no doubt, but that the primary object of the framers of the constitution was to protect individuals in

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cases like those suggested in the argument. But the language used is of general application and forbids the enactment of a partial law by which the rights of any individual shall be abridged or taken away. Nor is there a single provision in our constitution more salutary in its character, or that demands in its enforcement the exercise of greater vigilance and energy.

The only means by which the legislature can be kept within the bounds of the constitution in times of high political excitement, is to accustom its members to the restraints it imposes and to check their assumption of an excess of power promptly, whenever the case occurs. If when the public mind is quiet, and public opinion sustains the courts in the dispassionate and impartial exercise of its supervisory power, precedents of constitutional violations shall not be permitted to take effect, we may hope that each department of the government, accustomed to move in its legitimate sphere, with uniformity and harmony, will not readily run into excess, even in times of excitement and party strife. Public opinion too, accustomed to yield to the authority of judicial decisions, and to sustain the courts, even when they arrest the operation of a legislative act, will acquire a wholesome morality and a firm tone by which the courts will feel sustained and encouraged in the discharge of their duty, should the time ever come when the sanctuary of justice will be the last hope of the oppressed. Every case, therefore, where the constitutionality of a legislative act is drawn in question, is a grave and important matter, and while on the one hand the courts ought to entertain for the legislature the highest respect, and to decide against their acts only from the clearest convictions of duty; on the other hand, where they are clearly satisfied the constitution is violated, they have no alternative but to declare that such act of assembly is not law.

The act of assembly under consideration is attempted to be sustained upon two grounds, 1st. that the complainants whose estate was sold were infants, and that the legislature in passing the act were in the exercise of a guardianship over them, and 2nd, that the sale was necessary to pay the debts of the ancestor.

In the case of *Rice vs. Parkman*, chief justice Parker puts the exercise of the power to pass such laws on the ground that the parties interested are infants, and that the government is bound to exercise a guardianship over them. In Massachusetts the exercise of such a power by the legislature, is derived from the construction the court gives to their constitution, in which it is provided, (see same case 12 Mass. 334,) that the legislature shall have full power and authority from "time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, so that the same be not repugnant or contrary to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects thereof." These powers are very extensive, and some of them would seem to partake of a judicial character; but no such powers are conferred by our constitution on the legislature. It confers on the general assembly all legislative powers. No act can be passed which is not of a legislative character. But the habits of thinking in Massachusetts seem to have led to the concession that the powers of the legislature were analogous to those that are exercised by Parliament. In the opinion under review, the judge says, "this is a power frequently exercised by the legislature of this State since the adoption of the constitution, and by the legislatures of the province, and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament on similar subjects, time out of mind." Now it is manifest that the exercise of such a power by the British Parliament is no precedent by which our legislature should be governed. Parliament is omnipotent, it can do any thing not naturally impossible. Great Britain has no constitution established by the sovereign will of the people and paramount to the legislative power of Parliament; so far from it, that Parliament can change what they call their constitution, and hence it follows that it is above the constitution. Not so with us. The people have established the constitution as the fundamental and paramount law. The government is divided into co-ordinate departments. The legislature constitutes one of those departments, and is as much restrained and bound to move in its

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prescribed sphere, as either the executive or judicial. The opinion therefore which draws from the practice of Parliament an argument in favor of the power contended for in our legislature must be wrong.

The same opinion (page 331,) advances another palpable political fallacy to sustain this power. The judge says, speaking of the relative powers of the courts and of the legislature, "The constituent, when he has delegated an authority without an interest, may do the act himself which he has authorised another to do, and especially when that constituent is the legislature." This assumption places the legislature above the judiciary and constitutes it the sovereign. It is wholly inconsistent with the theory of our government. Sovereignty resides in the people, and having delegated to the legislature, to the judiciary and to the executive, the exercise of that portion of it as co-ordinate departments which they have considered most fitting to be exercised by each, they retain themselves the exclusive paramount sovereignty. So far then from the legislature being the constituent of the courts, the people are the only constituents, and all the officers of the government in all the departments are their agents.

The fact that the constitution may prescribe that the mode of appointing the judges shall be by the legislature, does not constitute the legislature the constituent. If so, the electors of president and vice president of the United States would be the only constituents of those functionaries. And as in some of the States, judges are appointed by the governor, in others by the legislature, and in others by the people directly, the constituency in each of these cases varying, the judges would be alternately at the feet of the legislature, the governor and the people. But no such absurdity exists, and the statement of the proposition must have resulted from inattention to the form of our state and federal governments.

It follows from this view of the subject, that the legislature is not sovereign, that it is not the constituent of the courts, nor are they its agents; and that any assumption by the legislature of powers conferred by the constitution upon the judiciary, is as destitute of authority as it would be in the courts, were they instead of adjudging what the law is, to undertake

the exercise of legislative powers, and to prescribe what it shall be. These observations are made in order to show that as the sovereignty does not rest in the legislature, the power to exercise a guardianship over the estates and persons of infants, does not exist in that body. It is the duty, certainly, of the government to protect and provide for those who are incapable of taking care of themselves; but it is the duty of the legislature to pass general laws whereby this may be done. We cannot concur with chief justice Parker, that the legislature "might resume the burthens of this business to itself," and perform all the duties of guardian for all the infants in the country. However that might be in Massachusetts in virtue of the very extensive powers granted to the legislature by their constitution, it cannot be the case here. For the same judge (page 331,) declares, "It is not legislation which must be by general acts and rules, but the use of a parental and tutorial power for purposes of kindness, without interfering with, or prejudice to the rights of any but those who apply for specific relief." Now if such acts are not acts of legislation, and the judge here declares they are not, then as we have seen, our legislature cannot constitutionally pass them, for it has none other than legislative powers, except in those particular cases where other powers are expressly conferred. The legislature must therefore enact general laws for the protection of infants and the management of their estates, and it can with no more propriety refuse to do so, than after such laws are passed, the courts can refuse to hear and determine the matters properly submitted to them. It results from what has been said, that the case of *Rice vs. Parkham*, is not an authority in this case. If there were no other objection to considering it as such, the dissimilarity of the two cases would prevent its application. There the infants were not deprived of their property by the legislative act, but it was only transmuted from real to personal property, manifestly to their advantage. Here, the property descended to these heirs, has been sold to satisfy debts for which they had not been rendered liable, and for the payment of which they had a right to require the application of the whole personal estate before their lands could be charged. In such a case as this, the court whose opinion has been so often

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referred to, would not have sustained the act. They say "no one imagines that under this general authority the legislature could deprive a citizen of his estate or impair any valuable contract in which he might be interested."

The other ground upon which the competency of the legislature to pass such laws is maintained is, that the sale was necessary in order to raise a fund to pay the debts of the ancestor. It is upon this ground that the supreme court of the United States puts the case of *Wilkinson vs. Leland*, 2 Peters 658. But in that case, the court declares that the devisee took the land, subject to the lien of creditors; that the act divested no rights "except in favour of existing liens of paramount obligation," and that it was "remedial in nature to give effect to existing rights." This construction of the laws of Rhode Island places the case upon a principle wholly inapplicable to the case now before the court. It is settled law in this State, that the debts of the ancestor constitute no lien upon the lands descended, in the hands of the heir. The creditors of the ancestor had established no right to have satisfaction of their debts by the sale of this land. This act could not therefore be "remedial in its nature to give effect to existing rights." When to this striking discrepancy between the two cases, we take into consideration the fact that Rhode Island has no constitution containing restrictions upon the exercise of legislative power, it is manifest that this case has no application to the present one.

We will next notice the two cases from Kentucky, 4 Monroe's Rep. 91, and 6 Mon. Rep. 592, cited by Judge Hickey in the opinion delivered by him in the case of *Bedford's guardian ex parte*, (Am. Ju. vol. 10, p. 297. The acts in both these cases were sustained upon the ground that the lands were appropriated to the payment of debts. Their application to this particular object, is the sole reason which the court (manifestly struggling to sustain them,) can give wherefore they were constitutional. This reason is clearly falacious. If it be lawful to sell by special act of assembly, the land of heirs for the payment of the debts of the ancestor, what reason can be given why with equal propriety the land of any citizen might not be subjected in the same way to the payment

of his own debts. Let it be remembered that infancy is now out of the question. The broad proposition is that the lands of heirs may be subjected in this way to the payment of the ancestor's debts whether these heirs be infants or adults; and why should this be when other debtors are only liable according to due course of law? Surely a man is as much bound to pay his own debts, as heirs can possibly be to pay the debts of their ancestor, and if he does not pay them promptly, and the course of law by which to compel him is deemed too tedious, why may not the legislature pass a law directing his lands to be sold for their payment. Does not the absurdity of such a proposition startle us, and yet it is identical in principle with that which is maintained in the two cases referred to. Again, as is well remarked by Judge Hickey, the constitutionality of the act upon this hypothesis, would depend upon the truth or falsehood of the suggestion, that the ancestor owed debts. The whole reasoning upon which these cases go, is so manifestly erroneous, that they are entitled to no weight. From this review of the cases relied on in the argument for the defendants, it results that neither the infancy of the complainants nor the fact that their land descended to them from their father whose debts were not all paid, gave the legislature any more power to direct a disposition of their estate in a manner not authorised by the general laws of the land, than exists in that body to dispose of the estate of any other citizen in the same way. That the legislature has power upon the suggestion, that a man owes debts, to pass an act directing the sale of his lands for their payment, no one would argue. And yet the exercise of such power would be less objectionable than the act in question. In this case the parties whose land was sold were not indebted. It was not certain that the debts due from their ancestor would ever become a charge on their lands. By this sale then their real estate is taken away and applied to the payment of debts they did not owe, not by the judgment of their peers, not by the law of the land; but by a special, partial act of the legislature, applicable to their case alone.

Since the case of the *Bank vs. Cooper*, 2 Yer. 599, several cases have occurred and have been decided by this court, upon the principles of that case. In that case it was decided,

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that the legislature had no power to pass a law, constituting a special tribunal for the trial of a particular class of debtors to the bank, by process not known to the general law and without the right of appeal. This cause was soon followed by the case of *Walley's heirs vs. Kennedy*, 2 Yer. 554, in which it was determined, that an act authorizing the court to dismiss Indian reservation cases, where they were prosecuted for the use of another, was a partial law, and unconstitutional. Next to this was the case of *Tate vs. Bell*, 4 Yer. 202, in which it was decided, that an act of assembly, authorizing the executors of William Tate to revive a judgment, which had been obtained by Geo. Bell in his life time, in their names, by *sci. fa.* against Montgomery Bell, was partial in its character, was not the law of the land and was void. In the case of *Officer vs. Young*, 5 Yer. 320, it was decided, that an act authorizing James Young to prosecute a suit then pending in the circuit court of White county, in the name of *Peter Elrod vs. Robert Officer*, without taking out letters of administration upon the estate of Peter Elrod, deceased, was unconstitutional and void. These cases were all decided upon the same general principle, that the several laws upon which they arose, were partial in their operation, acting only on special cases, and tending to deprive the parties to be affected by them, of their rights and property. The same principle applies to the case under consideration, with as much force as it does to either of the cases referred to. The act under consideration is equally special, equally restricted in its operation, and tends more directly to deprive the parties to be affected by it, of their property, than either of the acts above referred to. It is not, therefore, the law of the land, and is void.

Several cases have been referred to, where special laws have been declared constitutional by this court; such as the case of *Williams vs. Norris*, 12 Wheaton: *Ann Hope vs. Johnson*, 2 Yer. 123, and *Vanzant vs. Waddle*, (2 Yer. 260. These cases were all determined upon the principle, that they deprived no one of a right, but were enacted to advance the remedy of a party, whose right already existed. If they were susceptible of that construction, and we think

they were, then no one would doubt their constitutionality. They would not be subject to the objection, which exists to the present case.

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In the case of *Fisher's negroes*, 6 Yer. 119, we have an illustration of the difference between these two principles, involved in special acts of assembly. Fisher's negroes had been emancipated by his will, but in order to the enjoyment of their freedom, it was necessary, by the act of 1801, c 27, that a petition be presented to the county court, and upon its judgment, that their emancipation would be consistent with the interest and policy of the state; a bond and security were required to reimburse the county any damages it might sustain by the emancipation. In 1829, an act was passed, allowing slaves, who were emancipated by will, in case the executor should refuse to file the petition, and give the security required by the act of 1801, to file their bill in equity, and if the court should be of opinion, that said slaves ought of right to be free, it was required so to order. Fishers negroes filed their bill under this act, and while it was in progress, the legislature passed the act of 1831, c 101, declaring that the act of 1829 should not be construed, so as to extend to any case existing before the passage of the act, but that in all such cases, where bills should be pending under said act, it should be the duty of the chancellor, at the first term of his court, to have the same stricken from his docket. The chancellor refused to dismiss the bill as directed, upon the ground that the first act gave the negroes rights which the legislature had no authority by the second one to take away. It is true these acts, although probably intended for a particular case, are in form general laws. They nevertheless illustrate the principle upon which legislation may properly proceed in such cases. The chancellor's decree in this case was affirmed in this court. In the opinion of the court, as between master and slave, the will gave to the negroes a right to their freedom, and nothing was wanting to their enjoyment of that right but the consent of the government. This consent the legislature might give directly, by an act applying to the particular case, or they might by law vest the judicial tribunals with power to give it. No right was

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taken away by it. The negroes having been emancipated by will, Fishers distributees had no right to them. The act communicated a benefit to them, without impairing the right of any other person. Not so the act of 1831. That act was special. It only applied to cases where bills had been filed under the act of 1829, for the emancipation of negroes, who were liberated by will before the passage of this act. These it required should be dismissed from the chancery court, and no adequate mode of trial existed elsewhere. The court said that the effect of the act would be, to destroy the right communicated by the act of 1829, and that doing so, it was unconstitutional.

3d. It is insisted that these infants were instrumental in procuring the passage of this act of assembly, whereby the defendants were induced to advance their money for this land, and that it is a fraud in them now to take advantage of a want of power in the legislature to pass the law, and so to defeat the defendants title. Upon an examination of the proof, it does not appear that they had any agency in obtaining the passage of the act. One witness only speaks upon the subject, and he in answer to a leading question, indicates that the subject was spoken about in the family, without pretending that the children had any agency in getting up the petition to the legislature. But if they had done so, we are unable to perceive upon what ground they could be charged with fraud. If an infant sell his estate, making the most solemn promises to confirm the title when of age, his subsequent disaffirmance of it would be no fraud. A sale under a legislative act, procured at his instance, would surely be no more obligatory on him than one made by himself without such act. The same want of discretion which renders him unfit to be trusted in the sale of his property, would exist to the same extent in the other case, and incapacitate him from a discreet exercise of judgment as to the proposed application to the legislature. If this argument could prevail, no infant would be safe in his possessions. It would be easy for the party wishing to purchase his estate to induce him to apply to the legislature for the passage of an act, authorizing its sale; and after the sale would be effected, he would be told, that al-

though the act was void, yet a disaffirmance of the sale on his part would be a fraud. Thus would be accomplished indirectly that which the law prohibits from being done directly.

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4th. We next come to consider the question, whether the statutes of limitations operates in the cause, as to either complainant, and to what extent.

The possession was taken by Perry, the 1st January, 1827; but it is contended that there is no evidence that there was a continued possession for seven years. The proof of witnesses is unsatisfactory upon this subject. But there is no necessity for resorting to witnesses, as the pleadings sufficiently show how the facts are. The bill alledges that there was no such continued possession for the length of time necessary to form the bar, and seeks a discovery of the defendants upon this subject by interrogatories, requiring them to state how the fact is. The answer of Perry states, that he took possession of the land about 1st January, 1827, by his overseer and negroes, and moved to it, and took possession by himself and family in August of the same year, and remained on it till the month of May, 1831. He then moved his white family to Pulaski, and remained in Pulaski until 1st day of January, 1834, when he moved his family and again settled on said land, during all which time he had peaceable possession by his overseer and negroes. The complainants, by seeking a discovery of the defendant, have made him a witness upon this subject, and they cannot object to his testimony, when it makes against them.

5th. The possession having been proved, the next question is, how and against whom does it operate. The deed executed by the Jones' to the Steels, was dated the 23rd of May, 1826, and registered 25th of February, 1829. This suit was commenced the 24th day of February, 1835. Seven years did not elapse from the time the deed was registered, up to the time of the commencement of the suit. Whether, therefore, the first section of the act of limitations of 1819, c 28, will operate to bar the complainants' claim, is a question of some doubt, and which it is not necessary to decide.

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We shall therefore consider the case, in reference to the second section of said act. John R. B. Jones, the oldest of the complainants arrived at the age of twenty-one years, the 20th January, 1828. Jane R. White became of age the 1st day of November, 1829, but she was married to her present husband, Benton R. White, before 1st January, 1827; and Nancy M., the youngest of the complainants, did not become of age until 11th September, 1832. From these facts it appears, that John R. B. Jones is the only one of the complainants against whom the statute of limitations operates; and the next inquiry is, to what extent does it operate against him.

The complainants' counsel insists, that as the defendants possession is only protected by virtue of the second section of the act of 1819, it can operate in his favor only to the extent of his actual inclosures. In support of this position the case of *Dyche vs. Gass' lessee*, 3 Yer. 397, is cited and and relied on. That case does not support the position contended for. That was a case of naked possession, unaccompanied by title, legal or equitable, valid or invalid. It is true, Dyche, after he had been some years in possession, procured an informal deed, covering his possession; but from the date of that deed, seven years had not elapsed before the suit was brought. The case therefore was decided, as though the deed had never existed; and there appearing nothing in the case by which to determine the extent of the possession, save the enclosures actually made, the court determined that the possession must be restricted to such enclosures. In the opinion of the court, it is true it is said, "It is most difficult to distinguish between a defendant, in some appearance of claim, evidenced by writing of no validity in law or equity, and one holding as a trespasser, without excuse." These remarks doubtless misled his honor, the chancellor, and induced him to place this case upon the foot of a naked possession. It may be observed here, that the remarks above quoted were not called for by the facts of the case, and do not constitute a decision of the question, indicated by them. But if it be true, that one who is in possession, holding under an informal writing of no validity, either in law or equity,

would be restricted to his actual enclosure, it does not follow that such would be the case in relation to a party holding by virtue of a title bond, or an unregistered deed. On the contrary, we think it clear, that a party who is in possession for seven years of a tract of land, holding it adversely, under and by virtue of an unregistered deed, is protected by the second section of the act of 1819, to the extent of the boundaries of his deed. Why may not this be so? He certainly takes possession claiming to hold to that extent. Is there not the same reason why he should be considered as so holding, that exists in favor of such construction of a lessee's possession. It does not require a legal title, in order that the possession of a party shall be construed to extend beyond his actual inclosure. Possession taken under an equitable title, by which the boundary is defined, of a part, will be construed to extend to the whole in the same way that it would had the title been a legal one. We think, therefore, that as the complainant, John R. B. Jones, was twenty-one years of age more than three years before this suit was brought, he is barred of any recovery whatever in this case.

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6. The next question is, as to the jurisdiction of this court. The defendants claim title to the land in controversy, by virtue of a void deed, and the complainants seek to have said deed delivered up to be cancelled. It is settled in this state and elsewhere, that a court of equity has the power to order a deed, bond, or other instrument, to be delivered up to be cancelled, if the same be void, whether its character as such appear from the face of the instrument or otherwise. *Hamilton vs. Cummings*, 1 John. Ch. Rep. 517: *Bromley vs. Holland*, 7 Ves. 19: 1 Hovenden's Sup. 17: see also *Johnson vs. Cooper*, 1 Yer. 524, 530, and *Richmond vs. McMinn*, 6 Yer. Rep. Having obtained jurisdiction of the cause for this purpose, the court will retain it, until the whole matter is disposed of, and the rights of the parties settled.

7th. The complainants pray that the defendants be compelled to account for the rents and profits since they have had possession of the premises.

They are unquestionably entitled to an account as prayed

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for; but we are of opinion that in taking that account the defendants should be allowed for any valuable and permanent improvements they may have made, so that such allowances do not exceed the rents and profits for which they are chargeable.

The decree of the chancellor will be reversed and reformed according to the principles of this opinion.

Decree reversed.

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A, made and executed his last will about five days before his death. The will, after his death, could not be found: *Held*, that in the absence of proof to the contrary, it will be presumed that he cancelled it himself.

The bill alleged, that A left a will at his death, and that the defendant had destroyed it. The answer of the defendant denied all knowledge of the will, she admitted, however, that she said on the morning after her father's death, that "she had his will," but stated, that she meant by this, certain directions given verbally by A to her, concerning the property, and which she considered as his will: *Held*, that this explanation was nonsensical and absurd, and being disproved by one witness the court might act on the admission contained in the answer, wholly disregarding the explanation.

Although a discovery be sought from a defendant, it does not follow that all the statements made in the answer in relation thereto are to be believed. If an unreasonable and absurd explanation be given of a fact admitted therein, or if the answer contradict itself, or other parts of it are disproved, so that the credit of the defendant (as a witness) is destroyed, the court is not bound to act on the whole statement, although not contradicted by two witnesses, but may decree on the admission in the answer, disregarding other parts of it.

The declarations of a testator, that he never intended to give A, (who in the absence of a will would have succeeded to his property) any thing—that he was dissipated and worthless—together with an extreme dislike to A, and a solicitude to execute his will, and its actual execution a few days before his death, in favor of his grandchildren, were held to be such circumstances, as with the positive swearing of one witness, were sufficient to outweigh the answer of A, denying all knowledge of the will, &c.

When a will is lost, destroyed or suppressed, a court of equity will set it up.

This was a suit commenced in the chancery court at Columbia. Peter Akers, the father of Elizabeth Brown, one of the defendants, died on the 15th September, 1834, siezed

of a quantity of land, and possessed of a number of negroes, set out by name in the bill; together with other chattel property, such as stock, household and kitchen furniture, &c. The bill stated that Peter Akers made and published his will on the 26th August, 1834, by which he directed that after the death of the defendant, Charles V. Brown, a comfortable subsistence should be allotted to Elizabeth Brown, wife of Charles V., and that the balance of his property should be divided equally amongst the children of the said Charles V. and Elizabeth. The bill further charged, that the defendant, Elizabeth Brown, got possession of the will after the death of her father, and destroyed it or suppressed it, and that Charles V. Brown had taken out letters of administration upon the estate of Peter Akers. The bill prayed for the will to be produced, if in existence, and that it might be set up and declared the last will of Peter Akers, deceased, and that the letters of administration be annulled, &c.

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The defendants answered separately:—they both admitted the death of Peter Akers, as alleged, and that at his death he left the property set out in the bill, but denied that he had a good right and title to a large part of the property, which they insisted belonged of right to the defendant Charles V. Brown. They both stated, that if any will was made as alleged, they never saw it, and had no information on the subject, except from rumour. They insisted, that if such will was made, it was destroyed by Peter Akers himself, on account of changes which his own mind underwent. They stated that he was a very old man, being seventy-six at his death, and whimsical and changeable in his notions. Both defendants expressly denied any knowledge of the will, or that they ever had it in their possession or saw it, or that they had any knowledge as to what became of it, but expressed the opinion that it was destroyed by the old man himself.

Elizabeth Brown admitted in her answer, that she was dissatisfied with the provisions made for her in the will. She also admitted, that she had said on the morning after her father's death, that "she had her father's will," but when she said this, she meant certain directions which he had given

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Two witnesses proved the execution of the will and its contents, and that it was finally completed and witnessed about five days before Aker's death. A number of witnesses detail conversations with Peter Akers, in which he always expressed a determination to give Charles V. Brown no part of his property. Brown was proved to be a man much addicted to intoxication, and had wasted all his property, so that he was utterly insolvent.

One witness, (Amos Richardson,) proved that on the morning after Aker's death, he had a conversation with defendant, Elizabeth Brown, in which she said, "the will was in the house, or she expected it was there, the witness however believed her expression was, that it was in the house. The chancellor dismissed the bill.

G. S. Pillow, for complainants, contended, 1st, that the proof in the cause established beyond controversy the due execution of the will only five days before the death of Peter Akers.

2. That if a will is made and executed by a person, and the will cannot be found at his death, the law will presume that it was cancelled by the testator himself. Yet the rule was only applicable to cases where he retained its custody and control until his death. That such presumption could not arise when the proof shows the party interested in cancelling or destroying it, had control over it, or had previous to the parties death possession of his keys, valuable papers, &c. which was the case here. But,

3. The evidence in the cause clearly rebuts the presumption. The defendant Elizabeth admits in her answer, that after her father's death, she said the will was in the house. And this fact is directly proved by Richardson. True, she denies positively that she knew of the existence of the will, or that she destroyed it, and says she meant by "her father's will" certain directions verbally given to her by her father in relation to the property, which she considered as his will; and it is insisted her positive denial can only be outweighed

by one witness and corroborating circumstances. I consider that her answer has been so disproved. Her explanation of her conversation with Richardson is so absurd, and so inconsistent with the facts in the cause that it cannot be regarded. Richardson proves she told him the will was in the house on the morning after the old man's death. This witness, in connection with the admissions in the answer, and other corroborating circumstances disprove the denial, and will authorize this court to set up the will. (The counsel here went into an elaborate and minute investigation of the testimony, tending to disprove the answer, and contended that it amply sustained the positions he assumed.)

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A. O. P. Nicholson, for defendants. It is a rule of law, that if a man make his will and retain it in his possession, and after his death no will can be found, the presumption is, that he destroyed it himself, and it rests upon those alleging the contrary to prove it. See 3 Stark, 1715: 3 Phill. 128.

In this case, Akers having made his will and retained it, it devolved upon the defendants to prove its destruction by some person other than Akers himself. The answers being sworn to, and the bill not, in order to overturn the presumption of destruction by Akers himself, the denial in the answer must stand, until disproved by two witnesses, or one witness and strong circumstances. See Fonb. 647, n: 5 Yer. 452: 7 Yer. 155. Such proof was not produced—no witness contradicts the answer, for the conversation detailed by Richardson is easily explained. The proof was wholly circumstantial and therefore could not overturn the legal presumption.

The jurisdiction of the court in the case depended upon the fact of the existence of the will at the testator's death and its suppression, for it is settled, that unless this fact is clearly made out, a court of chancery has no jurisdiction to decide upon the validity of a will. In the case of *Tucker vs. Phipps*, 3 Atk. 360, it is said, that if the spoliation of the will is clearly proved, the party may come here without first going to the spiritual or law court. If spoliation or sup-

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pression is found, it will change the jurisdiction, and give to the chancery court jurisdiction which it had not before. To the same point, see 1 Mad. Ch. 325: Hob. 109: 1 P. Wms. 732: 2 P. Wms. 748: 2 Vern. 561: 1 Vern. 403 and 452. If the proof in the case did not establish the spoliation or the existence of the will, the chancellor was estopped from proceeding in the case, and was forced to dismiss the bill.

Every question concerning the execution and validity of a will is properly and only triable at law. 1 Mad. Ch. 259: 2 Ves. 288: 3 Bro. P. C. 358: 5 John. C. R. 155: Fonb. Eq. 720, n. In this case the complainants having failed to establish the suppression of the will, the chancellor properly dismissed the bill.

GREEN J. delivered the opinion of the court.

The bill charges that Peter Akers, of the county of Maury, departed this life on the 15th of September, 1834, leaving a considerable property; that he had no wife, and that Elizabeth, the wife of the defendant, Charles V. Brown, was his only child. Peter Akers, before his death, on the 26th of August, 1834, executed a will, by which he devised his property to the complainants, who are children of the defendants, Charles and Elizabeth Brown. The bill charges that the defendant, Elizabeth Brown, got possession of the said will immediately after the death of her father, and that she and her husband, Charles V. Brown, have suppressed or destroyed it, so that it cannot now be found. The answer of Charles V. Brown denies any knowledge of the existence of a will, or that he had any agency in its destruction.

The answer of Elizabeth Brown, admits that she knew her father had made a will, and that its contents were such as stated in the bill; but she denies that she ever saw the will, or that she had any agency in its destruction. She states her father had changed his mind relative to the disposition of his property before his death, and that she believes he had destroyed said will himself, for that he told her the morning before he died, that he had given out selling his property, as

he had intended, and that she must do the best she could with the things, and that she thought that was his will. She admits that the provision he had made for her in the written will was not satisfactory; admits that she had said, she had her father's will, but that when she said so, she meant the direction he gave to her to do the best she could with the things. The proof is clear and satisfactory, that Akers made a will a short time before his death. Bryant, a witness, proves that he wrote the will for the old man, and that after its execution he subscribed his name as a witness. Richardson, another witness, proves that only five days before his death Akers came to his house and requested him to witness his will; that he looked at the paper and saw that it was a will; that Bryant's name was to it as a witness, and that he also subscribed his name as a witness, and that Akers said he intended to get several other witnesses, to prevent any difficulty.

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Although it is thus clearly established that the will was in existence, only five days before the testator's death, yet, as Akers kept the will in his own possession, the fact that it could not be found after his death, in the absence of all proof, would raise the presumption that he destroyed the will himself. 3 Stark. 1715: 3 Phill. 128. And as the bill charges the defendants with its destruction, which they, in their answers positively deny, the rule is, that the answers must be disproved by two witnesses, or by one witness and circumstances. Fonb. 647, (n): 5 Yer. 452: 7 Yer. 155. According to these principles we will examine the facts of the case. And here it may be remarked, that the evidence abundantly establishes that every consideration of prudence, of feeling, and of duty, existed in the case, to induce the old man to make a will, and to make such an one as the witnesses prove he executed. Brown, his son-in-law, was a profligate drunkard, who had wasted his own property, until he had become utterly insolvent, so that the old man had taken his daughter and her children to live with him. If he died intestate, his estate would pass into the hands of a man whose confirmed habits would ensure that it would be speedily squandered away, without being of any service to the nu-

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merous family of grandchildren, for whom the old man had felt so much solicitude, that for years before his death he always kept a will, making in substance the same provisions with the last one; and that he executed a new one with the view only of making provision for such children of his daughter as were born after the execution of the former ones. With all these considerations pressing upon him he could have had no motive for its destruction. On the contrary, Brown and his wife had a powerful motive for its destruction. He would naturally desire to obtain the property as the means of gratifying his beastly appetites, and his wife, unfortunately, seems to have been but too much under the influence of her husband.

She was, as she admits in her answer, dissatisfied with the provision which was made for her in the will. Add to these considerations the fact, that the old man's keys were in her possession, and all his papers were in the power of herself and husband, so that if a will was in existence at the old man's death, it would fall into their hands; and as its destruction would affect the rights of no one, except their own infant children, the temptation to suppress it was not easily to be resisted.

In addition to these considerations, the evidence does satisfactorily show that the defendants have in fact suppressed or destroyed the will.

The only difficulty is, whether the proof is such as is required by the rule of evidence before stated. We think it is. Amos Richardson proves, that he was at the house of Mr. Akers, the morning after he died, and that when he started home, Mrs. Brown followed him to the gate, and asked him what she was to do about the way her father had left his estate. He asked her where was the will, and she replied, "In the house." Now this witness' testimony is in direct contradiction to Mrs. Brown's answer. It proves her knowledge of the existence of the will, after her father's death. The force of this evidence is attempted to be obviated in Mrs. Brown's answer. She says there, that it was true she had told several persons that she had her father's will, but that she thereby meant the conversation in which he

told her to do the best she could with the things. This statement in the answer is wholly inconsistent with the conversation with Richardson. She addressed him with evident concern, and manifested dissatisfaction at the manner her father had left his estate. She followed him to the gate, and asked him what she was to do about it. Would she have felt this solicitude had she supposed there was no other will than the simple direction to her, to do the best she could with the things? Surely she would not, for in that case the property would be left just as she wished it. Besides, she said to Richardson, that the will was in the house. Now, of the words her father had uttered to her, this was untrue. But of the written will it might be perfectly true; therefore, it must have been of the written will she was speaking.

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Without going further, we might stop here with the perfect conviction, not only that the will was in existence at the old man's death, but that it is satisfactorily proved by one witness and corroborating circumstances. Her statement to Richardson, "that the will was in the house," is in direct contradiction to her denial of any knowledge of it in the answer. He is then a witness disproving the answer. But her acknowledgment in the answer, that "she had frequently said she had her father's will," is evidence of the highest character, that it was in fact in her possession. True, knowing this admission would be proved, she attempts in her answer to give it a different meaning than the true one. No one can believe the meaning she ascribes to the admission, is the one that was in her mind when she made it. In the first place, such meaning would be manifestly nonsensical; and in the next place, Richardson proves she could not have had that meaning. What is the consequence? that we must believe the explanation, as well as take the admission? Not at all. We deduce evidence from an answer in the same way, and under the same rules that we receive proof of the confession of a party. Although that is subject to many suspicions to which admissions in an answer are not liable, still we give that which makes against a party its full force, and if that which is in his favor be unreasonable in itself, or be disproved by other witnesses, or be inconsistent with other

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facts in the cause, we reject it altogether. Apply this principle and reject this unreasonable explanation of hers, inconsistent as it is with her solicitude, the morning after his death, as to the way her father had left his estate, and disproved as it is by Richardson, and you have the unqualified admission in her answer, that she had frequently said she had her father's will. It is true the discovery which is sought from her in the bill makes her a witness, but it does not follow that every thing she may state in her answer is necessarily to be believed. The credit due to her answer is no greater than that which is due to the deposition of a witness. If then she contradicts herself, if she state things which are unreasonable, or if she be contradicted as to material facts by other witnesses, so that her credit as a witness is wholly destroyed, it does not follow that the court must act upon her statement, although there may not be two witnesses contradicting her.

In addition to this proof, of a direct character, showing that the will was actually in existence at the time of the old man's death, there are many circumstances in the evidence tending to prove Akers could not have destroyed the will himself. The profligate habits and insolvent circumstances of Brown have been before noticed. The proof shows, that in addition to the motives of prudence, to keep his property out of the hands of such a man, and the natural wish to provide for his grandchildren, which would not be done if he died intestate, he had a strong personal dislike to Brown. One of the witnesses saw him with a bruised eye, and he said Brown had struck him there with a waggon whip. These considerations excited in him a strong determination to exclude Brown from the enjoyment of any of his property. This resolution he had expressed to many witnesses. The proof is, that he was a man of steady, determined character, such as would be likely to carry out his purposes. In pursuance of this resolution, for years before his death, he kept a will by him, and only destroyed the preceding one when he had executed the new one. Aged and feeble as he was, yet he hobbled over to his neighbour Richardson's, only five days before his death, in order to get him to witness his will. Brown was so conscious of his unworthy conduct, and the

old man's dislike to him, that he said to the attendants around the old man's sick bed, that he hated to go where he was, for he looked angry at him. So careful was he of his papers, that he kept his keys in his hand under the cover of his bed, until the evening he died, when, he drew out his hand and gave the keys to one of his grand daughters, who gave them to her mother. His aversion to Brown was only equalled by his love and solicitude for his grand children, for whom he had provided in his will. He said to one of the witnesses the day he died, that he was willing to die, but he hated parting with those little children. In the face of all these facts, facts showing an aversion to Brown on his dying bed, and an attachment to the children, that made him in the very hour of dissolution cling to life for their sake; and having taken great pains only five days before to make a will which would gratify all these feelings, is it to be believed that he had himself destroyed it. No one can believe it. If he did not destroy it, the conclusion is inevitable, that Brown and his wife did. We are therefore of opinion, that these circumstances are sufficient to establish the fact, that the will was in existence at the time of the old man's death; and that if proof in addition to the evidence of Richardson and the admission of Mrs. Brown's answer were wanting, it would be found in these facts. The spoliation and suppression of this will, as the court thinks, having been satisfactorily established, the jurisdiction of a court of chancery to set it up and to decree the legacies is unquestionable.

The decree of the chancery court will be reversed, and this court, proceeding to render such decree as the chancery court should have made, order and adjudge, that the will of Peter Akers, deceased, dated 20th of August, 1834, as its terms are stated in the deposition of Bryant, be set up and established, and that the executors therein named be allowed to qualify and take out letters testamentary thereon, to the end that the trust reposed in them be executed, and that the cause be remanded to the chancery court at Columbia, to be further proceeded in as to equity may belong.

Decree reversed.

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SMART AND WIFE *vs.* WATERHOUSE *et. al.*

Smart & Wife

v

Waterhouse

Where a widow intending to dissent from her husband's will has been prevented by the misrepresentation and fraud of the executor, from doing so within the time required by the act of 1784, c 22, § 8, a court of equity will relieve her and give to her such portion of the estate as she would have been entitled to, if she had dissented within the time required by law.

It is a settled rule, that where an act has been prevented from being done by fraud, equity will consider it exactly as if it had been done.

Where a widow has been prevented by fraud from dissenting to her husband's will, the executor will be deemed a trustee &c. the same as if she had dissented in time, therefore the act of limitations will not bar her from relief in equity.

A widow prevented by fraud from dissenting to her husband's will, within the time required by law, will be placed in equity in the same situation in every respect she would have been had she dissented in time.

Legacies and distributive shares are not affected by the act of limitations.

If a right be acquired by fraud, and the cause of action be concealed by fraud from the plaintiff, the statute of limitations will only run from the time the fraud is discovered.

A intended to dissent from her husband's will; the executor represented to her that it would produce great confusion in the estate, that her distributive share was about £5000, and that if she did not dissent she should be paid that amount; in consequence of which she did not dissent. The executor at the time he made these representations knew, or from his situation had the means of knowing, that her share would be double that amount: Held, that this was a fraud upon the widow, and that a court of equity would grant her relief.

The bill in this case was filed to set aside an agreement made between the complainant, Elizabeth Smart, before her intermarriage with the complainant, and the defendants Richard and Blackstone Waterhouse, executors of Richard G. Waterhouse, deceased. The bill in substance charged that complainant was the widow of Richard G. Waterhouse who died in 1827, having made and published his last will and testament. That the complainant Elizabeth was his widow, and not being satisfied with the provisions made for her in the will, intended to dissent from it within the time prescribed by law, but was prevented from doing so by the fraud of the defendants Richard and Blackstone. That in consequence of their fraud she entered into a contract with the executors which the bill seeks to set aside.

The contract referred to; the answer of the executors, and all the evidence necessary or material to be noticed are stated in the opinion of the court.

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The chancellor considered the contract as operative and binding on the complainant, and decreed accordingly.

Geo. S. Yerger and J. Rueks, for complainants. 1. We contend the evidence in this case establishes beyond doubt, that the widow of Richard Waterhouse was prevented from dissenting to her husband's will within the time required by law, by the fraudulent representations and concealments of the executors. In such case the rule is well settled, that acts prevented from being done by fraud will in equity be considered as done. 1 Jacob and Walker's Rep. 96: 11 Ves. 638: *Huguson vs. Basely*, 14 Ves. 290: 3 Cowen's Rep. 537: 1 Story's Eq. sec. 187, 256: 1 Ves. Sen. 123, 4.

2. If the representations made to the widow were untrue, although the executors may not have known them to be so at the time, yet as they occupied the relation of trustees towards the widow, and they had the means of knowledge within their power, and the widow having acted on these representations, they must in equity be made good; so far as her interest is concerned, they are to be considered a fraud upon her rights. 1 Sto. Eq. § 193, 4: Sto. Eq. § 149, and cases cited in note (1.) 1 Sto. Eq. § 218, 321, 322.

3. The widow had a right to elect whether she would take under the will or by operation of law. The executors were trustees and were bound to afford her the necessary information upon which to make her election. This they did not. They were bound to communicate to her the amount of the personal estate. This they concealed from her. It is evident her election under the circumstances was not made with a full knowledge of her rights, nor with the necessary means of information, and therefore is not binding upon her. Sto. Eq. § 216, 217, 190, 118, 119, 120, 134: 3 Swan. Rep. 73: *Snelgrove vs. Snelgrove*, 4 Dess. Rep. 274: *Dunnery vs. White*, 1 Swan. Rep. 137: *Murray vs. Palmer*, 2 Sch. and Lefroy, 474: *Pusey vs. Desbouvrie*, 3 P. Wms. 316: *Ewing vs. Lewellen*, 2 Bro. Ch. 151.

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If a person agrees to give up her claim to property, in favor of another such agreement is void, if she was ignorant of her rights and of the value of the property, especially if the other party possessed better information on the subject. *McCarty vs. Decuis*, 2 Russell and Milne, 614.

4. But if the decree in this case is to be governed by the contract between the executors and the widow, we contend she will be entitled to the same relief as if it were set aside. The weight of the testimony shows that by the contract she was to have a child's part, by which was meant as much of the estate as by law she was entitled to, this was estimated at \$5000, it turns out to be more. She is not bound to take the estimate, but will be entitled under the contract to what her portion would be by law. *Cocking vs. Batte*, 1 Ves. Sen. 401. And the contract binds the estate, not the executors personally. 1 Ves. Sen. 126.

5. The act of limitations is no bar to the relief sought in this case. Because legacies and distributive shares are not affected by the acts of limitation. Angel on Lim, 356: *Detouch vs. Savetier*, 3 John. Ch. Rep. 215 to 217: *Stackpole vs. Stackpole*, 4 Dow's. Rep. 209: *Armstrong vs. Campbell*, 3 Yerg. Rep.

Acts prevented from being done by fraud are considered in equity as done. If therefore the act of limitations would not have run had she dissented, it necessarily follows that if she is prevented by fraud from dissenting, it cannot operate, because in such case in equity her dissent is considered, as to all legal consequences, precisely as if made. But 2nd. the act cannot operate, because the bill alleges and the proof shows the fraud was concealed and undiscovered by the complainant until about one year before the bill was filed. Angel on Lim. 348: *Haywood vs. Marsh*, 6 Yerg. Rep.: *Kane vs. Bloodgood*, 7 John. Ch. Rep.

W. E. Anderson and A. J. Marchbanks for defendants.

We insist that the contract stated in the bill by the complainants, that the executors agreed to give the widow \$5000 out of the estate, not to dissent to the will, or the value of the property she would be entitled to, by dissenting is not made

out by the proof. It is denied in the answers. And we insist that the law requires the evidence of two witnesses to outweigh the answers of either defendant, or one and strong corroborating circumstances. Foub. Eq. 4th ed. 647. Here the corroborating circumstances are all against the contract and in favor of the answer of the defendants.

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2. If in the estimation of the court the contract be proven, still we insist that its execution by the executors would have been a waste of the assets and a breach of trust by them. They derive all their power from the will. 2 Williams on Execu. 1104. The will in this case contains express directions as to the manner in which the executors shall dispose of the estate, therefore any application of the effects different from the directions, is a waste for which the executors would be individually responsible. 2 Williams on Ex. 1104. Courts of equity never enforce contracts when the doing so would be a breach of trust. 1 Maddox Chan. 411: Sugden on Ven. 175: *Mortlock vs. Buttur*, 10 Ves. 282, 311: *Hill vs. Buckley*, 17 Ves 394.

3. By the terms of the pretended contract, the \$5000 was to be paid out of the estate of the testator, this promise was made and the debt became due in 1827, this suit was commenced 6th July 1832, therefore we insist that it was barred by the statute of limitations of 1789, requiring suits to be brought against executors and administrators in two years, if not by that, we insist it is by that of three years.

And 4th, we insist that the court cannot now permit the widow to dissent to the will and elect to take her dower instead of the provisions made for her by the will; first, because she, with a full knowledge of her rights and a perfect knowledge of the condition of her husband's estate, received the special legacy bequeathed to her, thereby making an election to take under the will in preference to an interest in opposition to it, and she is now estopped by that election from claiming any interest against it. 2 Williams on Execu. 886, 691: Clancy on Rights of Women, 249. Secondly, because she failed to dissent to the will in six months agreeably to the act of 1784, c 22, § 8. The common law right of the widow to elect at any time to take her dower instead of the provision

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of the will conflicts directly with the provisions of this act of assembly. The eighth section of the act repeals all laws coming within its purview, so that this is not a new remedy given to the widow, but is a limitation to her right of election. *Winstead vs. Winstead*. 1 Hay. 243. There being no exception to this limitation, the court can make none, not even in cases of fraud and hardship. *Patton vs. M Clure*, Mar. and Yer. R. 325: *Hamlin vs. Smith*, 1 Mur. R. 115. Courts of equity are as much bound by the provisions of a statute as courts of law. 3 Brown's Ch. Rep. 510: 4 Wheaton's Rep. 466.

GREEN, J. delivered the opinion of the court.

The bill charges that Richard G. Waterhouse, late of Rhea county, made his will on 1st. February, 1827, and shortly afterwards departed this life, leaving Richard and Blackstone his executors, to whom, and to the other defendants his children, and the complainant Elizabeth, he devised his estate. That the complainant, Elizabeth, who was the widow of the said Richard G., but has since intermarried with the complainant, William C. Smart, was not satisfied with the provision made for her in the said will, and determined to dissent therefrom within the time prescribed by law. The executors ascertaining her purpose, represented to her that her dissent would throw the whole estate into confusion and produce confusion among the other legatees, and therefore they wished that she would not dissent from the will. Richard Waterhouse, the oldest of the executors, represented to her that the estate was not worth more than \$40,000, and proposed to give her \$5000, or her part in money, if she would change her determination. Being perplexed and not wishing to do any thing that would injure others, she accepted the proposition, and the executors promised to pay her the value of the property to which she would be entitled were she to dissent, and which they said would be about \$5000, or that she might elect to take the \$5000, or the value of the property when it could be ascertained. The agreement thus made was to be written out by Spencer Jarnagin Esq. as he was expected soon to pass by on his way to court. She was afterwards told that Mr.

Jarnagin had no time to do the writing and that he had passed by, but as new assurances were made to her, she confided in the fulfilment of the contract, and suffered the six months to elapse without dissenting. The bill charges that Richard made the agreement with the fraudulent design of preventing complainant, Elizabeth, from dissenting as the law requires, and that he has fraudulently put her off from time to time with new promises that every thing should be done according to the agreement, until within one year last past, and that she has been thus prevented by fraud from filing her bill. Nor did she know the value of the estate until the executor filed his expose of the estate, the 2nd of May 1831, in the Rhea county court, whereby the estate appears to be worth \$75,000.

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Prayer, that the agreement be enforced and that she be reinstated in her right of election and be now permitted to enter her dissent therefrom, with all the rights to which she would have been entitled had her dissent been entered within the six months prescribed by the statute, and for general relief, &c.

The answer of Richard Waterhouse admits, that the complainant expressed dissatisfaction with the provision which was made for her in the will, and he suggested that she might wish probably to live elsewhere than at the home place, where, by the will she was to reside and be provided for, and that he promised her, that if she became dissatisfied and wished to remove, he would give her \$500 out of his part of the estate, and would advise the other children to do the same, but that this sum was not to be given if she married. With this promise complainant appeared perfectly satisfied, and said she wished the agreement reduced to writing by Mr. Jarnagin, to which respondent consented, denies that he prevented by fraud, the agreement from being reduced to writing or that he has made promises since by which said Elizabeth has been deluded. He insists the agreement has been made more than three years, and relies on the statute of limitations of three years, and the statute of two years, and the statute of frauds, and that the complainant Elizabeth not having dissented from the will of her said husband within six months after its probate, she is precluded from doing so now by the positive provisions of the statute.

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Samuel R. Hacket, a witness states, that Richard Waterhouse told him that he had compromised with the widow and agreed to give her \$5000, if she would not dissent, which was supposed to be a child's part. Mira Thompson states, she was present at the time of the contract, that Richard Waterhouse was very unwilling that the widow should dissent from the will, and told her he would give her \$5000 if she would not. He called \$5000 a child's part of the estate, and said she should have a child's part. It was agreed Mr. Jarnagin should do the writing. William N. Gillespie states, that Blackstone Waterhouse told him, that himself and Richard had promised the widow \$5000 if she would not dissent from the will, and that Mr. Jarnagin was to do the writing, he further stated that the time had elapsed and the writings were not drawn, so they did not intend to give her any thing. Several witnesses introduced by the defendants say they heard Richard say he was to give \$500 if the widow did not marry, and some of them say they heard Mira Thompson say that the children were each to give the widow \$500.

1. The first question for the consideration of the court is, whether the complainant, Elizabeth, was prevented by the fraud of the executors to this will from entering her dissent thereto, according to law. There is no question in the mind of the court, but that a contract was made, by which this widow was promised what she deemed an equivalent to the part of the estate she would be entitled to by law, if she were to dissent from the will. Whether this agreement was that she was to have \$5000, or whether she was to have the value of a child's part, and such part was estimated at \$5000, does not precisely appear. It is most probable from the proof that \$5000 was to be given in lieu of that she would get by law.

That the dissent which the widow intended to enter to the will was prevented by the solicitation of the executors, and their promise to pay the \$5000 cannot be doubted; and the question is, whether this agreement was fraudulently entered into with a view to delude her with the expectation of its fulfilment, until the six months should elapse, within which the statute permitted her to dissent from the will. Both of the executors admit that Jarnagin was to reduce the agreement to

writing, and no satisfactory explanation is given why it was not done. Blackstone, one of the executors, told Gellespie that the time for the widow to dissent had elapsed and that himself and Richard did not intend to give her any thing. This declaration, together with the subsequent refusal to pay any thing, and their concealment for a long time of the true condition of the estate, constitute evidence strongly tending to establish, that when the agreement was made there was no honest purpose to fulfil it; but be this as it may, this agreement was grossly fraudulent on another ground. The bill charges that the estate was represented by Richard, the oldest executor, as being worth only \$40,000, but shortly before this suit was brought it was discovered to be worth \$75,000. These charges are amply sustained by the proof. Both Hacket and Mrs. Thompson state that Richard estimated \$5000 as equal to a child's part. There are five legitimate children and four that are illegitimate. If we suppose that by a child's part he meant to include the nine children, that would make the estate worth only \$45,000. By the inventory filed by the executor the 2nd May, 1831, the estate is reported to be worth upwards of \$75,000. This misrepresentation of the value of the estate must have been wilful. No reason is given why he did not as well know the value of the estate at the time he made the contract with the widow, as at the time he returned his inventory. As far as we can see, all the information upon which he afterwards acted was in his hands at the time he made that contract. A very large portion of the estate consisted in notes executed to the testator; these were of course in his possession and the amount could have been ascertained in a few hours. The negroes and the lands were all well known to him. He had in his power the means of ascertaining very nearly the true value of the estate. He was dealing with a woman unaccustomed to business of the kind, without the means of information, and confiding in him for a correct representation of the affairs of the estate. He was bound to disclose the truth, that she might be enabled to act discreetly with all the facts before her. This he failed to do. He availed himself of her ignorance, and her confidence in him, to misrepresent the facts and to get a most unconscientious bargain from her. In addition

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to this he has kept back the inventory from the spring of 1827, when his father died, until May 1831. The will required the executors to make an inventory and state the value of the estate within two years, and afterwards to do the same thing every year. This was not done, and no excuse is given except that the estate was in litigation. But by his own showing it was still in litigation when he filed his inventory. Besides as he was to make an inventory and state the value of the estate yearly, these statements would show the operation of the law suits, and explain any variation in the amount of the estate. The reason given therefore, rather constitutes a reason why he should have complied with the will, and filed his inventory promptly. At the conclusion of the inventory, the executor remarks that the estate had turned out far beyond his expectations. There is nothing in the case to authorise the belief that this can be true. We have no information of the successful termination of any law suit, or the discovery of any property, of the existence of which, he had not had knowledge when he first became executor. The statement at any rate, was uncalled for when it was made, and must have been placed there for some motive. When it is remembered that he had represented to the widow that the estate was worth only \$40,000, and now by his own showing, it was about to be made public that it was worth nearly double as much, he felt that it was necessary to say something to explain away what would appear his palpable misrepresentations. In this instance his conscious guilt in attempting an apology, has furnished evidence of its existence.

From this view of the case we are of opinion, that Richard Waterhouse, the acting executor, fraudulently concealed from the widow the true value of the estate, and induced her to make a bargain by which she was prevented from dissenting from her husband's will, and consented to take a much less sum than she would have been entitled to had she dissented. It is unnecessary to notice his answer. If the facts stated in it be true, the fraud is if possible more gross than that made out by the bill and proof. If, as he says, for an interest in the estate which she was about to obtain by dissenting from the will, worth near \$10,000, she consented to take his promise for

\$500, and his advice to the other children who were infants to pay a like sum when they became of age, the inadequacy of the consideration is so gross as to shock the mind and constitute of itself evidence of fraud.

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2. But it is insisted that no matter what circumstances of hardship, or of fraud may exist in the case, a widow cannot obtain the benefit of the act of 1784, c 22, § 8, unless she dissented from the will of her husband within six months. The preamble declares, that the dower allotted by law to widows, was inadequate to their support, and that it was highly just and reasonable that those who have contributed to raise up an estate for their husbands should share in it, after which it is enacted, "that if any person shall die intestate, or shall make his last will and testament, and not therein make any express provision for his wife, by giving or devising to her such part or parcel of his real or personal estate, or to some other for her use, as shall be fully satisfactory to her, such widow may signify her dissent thereto before the judges of the supreme court, or in the court of the county wherein she resides, in open court within six months after the probate of the said will and, she shall be entitled," &c.

The whole scope of this act is in a spirit of liberality towards widows. That feeling is manifest not only in the preamble, but also in the body of the section. It authorises her to dissent, unless the provision made for her shall be fully satisfactory. But in fixing the short period of six months and in making no exception in favor of cases of disability, that spirit is wholly departed from, and a very harsh provision is made, if the construction contended for by the defendants counsel be the true one. But whether in cases of disability to make the dissent, an election can afterwards be had, it is not now necessary to decide. The case now before the court proceeds upon entirely a different principle. This woman has been prevented by the fraud of those who were interested in the estate from entering her dissent. She was about to avail herself of the provisions of an act made for her benefit, and the defendants interposed, and by fraud prevented her, and now they set up the consequence of this fraudulent act as a bar to the right she would have obtained; this we think they cannot do.

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It is a rule laid down and acted on in many cases, that where an act has been prevented from being done by fraud, equity will consider it exactly as if it had been done. 1 Jac. and Walk. 96: 11 Ves. 638. 14 Ves. 290: 3 Cow. Rep. 537: Story's Eq. § 187, 256. The case of *Luttrell vs. Almions*, cited in Jac. and Walk. 96: 11 Ves. 638; and by which the court in those cases was governed, is in principle precisely like the one before the court. There, a tenant in tail having been fraudulently prevented from suffering a recovery, the estate was treated as if the recovery had been suffered, though in favor of a volunteer and against one not a party to the fraud. So, here, we think this estate must be disposed of as if the dissent to the will had been made within the six months.

3. But it is insisted the statute of limitations is a bar to the complainant's claim. We think the statute of limitations has no application. Treating the subject as though that had been done, which by the fraud of the defendants was prevented, it places the question as it would have stood had the dissent been entered in the six months. Had that been done, it would not be questioned but that these executors would have been in the execution of an express trust. Upon the dissent of the widow, the executors would have occupied precisely the relation to her, that an administrator in a case of intestacy sustains to the distributees, and legacies and distributive shares are not affected by the act of limitations. Ang. on Lim. 336: 3 John. Ch. Rep. 215 to 217: *Armstrong vs. Campbell*, 3 Yer. Rep. An administrator takes possession of the property as a trustee; he can hold in no other character. It is not a case where a party takes possession in his own right and is turned into a trustee by matter of evidence. In such case the statute of limitations would operate. But it is well settled upon reason and authority, that in cases of direct and express trust it will not.

If therefore, equity will place the present complainant in the situation she would have occupied had the fraud not been committed, it follows that the statute of limitations is no bar to the relief she seeks.

But the bill charges, and the proof shows, that the value of this estate which was only known to the executors, was con-

concealed by them when they made the contract that prevented the dissent, and that the information of their fraud in this particular, came to the knowledge of the complainants only about one year before the bill was filed.

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It is settled law in this court, that if a right be acquired by fraud, and the cause of action be by fraud concealed from the plaintiff, in a court of chancery the statute will only run from the time the fraud is discovered. *Haywood vs. Marsh*, 6 Yer. Rep.: *Reeves and Hyter vs. Ewing*, 8 Yer. Rep. We think the relief given by the chancellor by which a specific execution of the contract for \$5,000 was decreed is erroneous, and that it be reversed and that the complainants are entitled to a child's part of the personal estate, and that complainant Elizabeth is entitled for life to one third of the real estate of which Richard G. Waterhouse died seized, as dower.

Decree reversed.

ALEXANDER vs. WALLACE, et al.

If a matter stated in an answer, be a direct and proper reply to an interrogatory contained in the complainant's bill, it is evidence for the defendant though it be in his favor.

If, however, an answer be not a direct reply to an interrogatory in the bill, but in avoidance of some allegation which the defendant was compelled to admit, the answer is not evidence of the matter in avoidance.

Where, in equity a fund belonged to A, but the legal interest therein was in B, A filed a bill to prevent B from getting the fund into possession; *Held*, that if A was indebted to B, in a less amount, equity would compel him to discharge the debt, before the fund will be decreed to him, especially if A is insolvent.

The facts of this case, necessary to be stated, are contained in the opinion of the court.

Thos. Washington, for complainant.

F. B. Fogg, for defendant.

GREEN J. delivered the opinion of the court.

The bill alleges, that one William Bowman became indebted to the complainant for goods sold him to the amount

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of \$5,936, for which he in 1827 executed his note, payable some short time thereafter; that he put said note into the hands of the defendant, William Wallace, for the purpose of collection, and to get the payment of it better secured; afterwards on the 23d of Nov. 1830, the said William Wallace, in order to secure the payment of said note, took a new note from Bowman, payable to himself for the sum of \$4,706 25, falling due 1st Jan. 1832, and at the same time Bowman executed a deed of trust to the defendant E. H. Foster, for a tract of land in Rutherford county and several negroes, the better to secure the payment of said note. That the note was put in the hands of E. H. Foster, by Wm. Wallace, for collection, with his blank endorsement thereon, to enable him to collect the same through the bank, where it was payable, and not for the purpose of transferring any interest to him.

The bill further stated, that Joseph Wallace, another of the defendants, claims an interest in said note, and has given said Foster notice to pay the proceeds to him. Complainant knows not under what pretence the said Joseph Wallace claims the proceeds of said note, but charges, that if any assignment was made by William Wallace to said Joseph Wallace of the proceeds of said note, it was fraudulently done, and that Joseph Wallace had notice, that the proceeds of the note belonged to complainant. The bill charges, that the note was not assigned to Joseph Wallace by William Wallace in the usual course of business or trade. The bill concludes with a prayer that William and Joseph Wallace be compelled to disclose the nature of Joseph Wallace's claim to said note, and when, and how it originated? whether he acquired his right in the usual course of trade or business, and what was the transaction in all respects in which he did acquire such right, and whether he had not notice? &c. Prayer that the proceeds of the note be enjoined in the hands of Foster, until the termination of the suit, and then be decreed to complainant.

The answer of Joseph Wallace admits, that Bowman was indebted to complainant, and that the notes on him were put into William Wallace's hands by complainant for collection,

or to get the debt better secured, and that said debt is the same which is secured by the note in controversy, but insists that the note from Bowman to Wm. Wallace was taken for the sole benefit of the said William, under an express contract that he was to be entitled to any security he could obtain from Bowman, he agreeing to pay the amount secured in two and three years from the month of October or November, 1830. The answer further states, that in September, 1830, the said William Wallace was indebted to the firm of Wallace and Hobbs, of which firm Joseph Wallace was a partner, in a large sum of money, and to secure the payment of the said money, the said William Wallace transferred to defendant, Joseph Wallace, about the 26th of November, 1830, a note on William and Samuel Bowman for \$2000, due 1st July, 1830, payable to complainant, and by him endorsed, and also at the same time transferred to him the note in controversy on William Bowman for \$4,706 25, by delivering to defendant, Joseph Wallace, the receipt of Foster and Fogg for the same. Defendant denies that he had at the time of the transfer, or until a long time afterwards, any notice or suspicion that the notes or bill single, or either of them belonged to complainant, or that he had any interest in them; the said William informing defendant that they were his own property. These transfers were honestly made, and on the 18th day of January, 1831, defendant gave a written notice to said E. H. Foster, that he was the holder of, and had the interest in said receipt of Foster and Fogg.

The answer further states, that the complainant is indebted to the defendant, Joseph Wallace, in a large sum of money, about \$2,300 for money paid by defendant to Adams, Reynolds & Co., for the use of complainant, for a bill of exchange drawn for the accommodation of the complainant on William Wallace, for \$4,250, which bill, complainant agreed to pay at maturity, and failed therein. Said sum above mentioned defendant has paid, and is liable to pay the balance to the holders; and as the complainant has become insolvent, he claims to retain in equity the amount of said bill of exchange and interest, even if complainant were entitled

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to the note specified in the receipt of Foster and Fogg. He denies all fraud, &c.

The answer of William Wallace admits, that previous to the 1st January, 1830, complainant put into his hands for collection notes on William Bowman, to the amount of about \$6000. This defendant states, that afterwards in the month of October or November, 1830, he saw complainant in Louisville, Kentucky, when the complainant proposed to this defendant to take the said claims on Bowman, and pay for them in three equal instalments from that time—the complainant being doubtful of Bowman's solvency. To which proposition defendant agreed, provided he could see upon his return to Nashville any probable means of securing the payment of said claims. When defendant returned to Nashville, he concluded to take the complainant at his offer, and accordingly wrote to him to that effect,

This defendant in further answering, repeats in substance the answer of Joseph Wallace. The other answers are not material to the questions involved in the cause.

The evidence shows that the defendant, Joseph Wallace, on the 27th of August, 1830, drew a bill of exchange for \$4,250 on William Wallace, of New Orleans, for the accommodation of complainant, who undertook to pay the same when at maturity. This was not done, and the defendant, Joseph Wallace, has paid part of said sum and is responsible to the holders for the balance.

Upon these facts, it is contended in the first place by the defendants, that William Wallace's answer establishes a contract between himself and Alexander, the complainant, that said Wallace was to take the notes on Bowman for his own use and pay to complainant the amount in one, two or three years, and that therefore the bill single in controversy was executed to William Wallace for his own benefit, and that the proceeds thereof rightfully belong to Joseph Wallace, by virtue of the transfer of the receipt of Foster and Fogg to him.

We do not think that William Wallace's answer is to be taken as evidence of this contract. It is often very difficult to determine what in an answer is responsive to the bill and

what is stated in avoidance. If a matter stated in an answer be a direct and proper reply to an interrogation of the complainant, then it is evidence, though it be in favor of the defendant, and unless rebutted by proof, must be taken as establishing the facts stated. But if the facts be not stated in direct reply to the bill, but in avoidance of some allegation the defendant was compelled to admit, then the answer is not evidence of the matter in avoidance.

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In this case the bill does not in the stating part of it, allege any fact in relation to the contract stated in William Wallace's answer. It states that Bowman was indebted to complainant; that his claims were placed in the hands of William Wallace for collection; that Wallace took the note and security in question from Bowman in discharge of so much due complainant, and that the deed and bill single were placed in Foster's hands, that the money might be collected for complainant's benefit. All these facts are admitted by the defendant, except that the bill single was placed in Foster's hands for the benefit of the complainant. This he denies, and this is all the answer; this the statement of the bill required him to make. No discovery as to the nature of his own right and how it was derived is sought from him, and consequently all his statement about the contract with complainant is voluntary, and is made by him to avoid what he saw would be the complainant's right to the note, notwithstanding his denial. Nor is this statement in the answer a direct and proper reply to any interrogation of the complainant. Although the stating part of the bill may not have required the answer, yet if the complainant had chosen to make a witness of defendant, and had propounded such interrogatories as to make the matter stated in this answer a direct reply to them, then the answer would have been evidence. But the interrogatories in this bill have all of them relation to Joseph Wallace's title to the note, how derived, upon what consideration, whether with notice of complainants' right to it, and that William Wallace had no interest therein. None of these interrogatories call for a disclosure of the facts in question. The information respecting Joseph Wallace's claims and the transactions attending its origin would be the

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same, whether William Wallace or the complainant were equitably entitled to the proceeds of the note. The facts stated in William Wallace's answer are not at all in reply to any question relative to the manner in which Joseph Wallace became connected with the transaction. We are therefore of opinion, that the complainant is entitled to the proceeds of the bill single in controversy.

2. The next question raised is, whether Joseph Wallace is not entitled to a decree for so much of this fund as the complainant Alexander may owe him.

This fund was in such a situation, that according to the law it would have gone into the hands of Joseph Wallace, had not the complainant come into the court of chancery for its aid. One of the best maxims of a court of chancery is, that "he who seeks equity must do equity." The complainant comes into this court to take this fund out of the hands of defendant; ought he not, before he is permitted to do so, discharge any debt due defendants from him?

We think he ought, and more especially so, as it is alledged in the answer, that he is insolvent? But the complainant's counsel insists, that in this case Joseph Wallace ought not to have equity, because as he alleges, he was guilty of a fraud in placing the fund in its present situation. This view of the subject seems to have governed the chancellor in making his decree. We do not perceive upon what evidence his honor founded that opinion. The bill interrogates the defendants especially upon this subject, and the answers of both the Wallaces' contain full circumstantial and direct denials of all fraud charged. These answers are evidence of the matters thus drawn from the defendants, and they must stand acquitted of fraud unless there be other testimony—none other is produced. We cannot conceive, therefore, upon what ground it is contended, that Joseph Wallace is guilty of fraud.

Let the decree of the chancellor be reversed, and let an account be taken between complainant and Joseph Wallace, until the coming in of which, let all other matters be reserved.

Decree reversed.

PEAY vs. POSTON.

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When a judgment is obtained against the principal and surety in a note or bill single, and the party who obtained the judgment agreed with the principal to stay execution for six months: *Held*, that such agreement will not discharge the surety.

The facts in this case presented several questions, which were argued at the bar, but as the court, in its opinion, has noticed but one, it is unnecessary to state any facts but those upon which the opinion was founded.

From the bill answer and evidence it appeared that Charles Baily as principal, and complainant as his surety, executed a note for \$368, which note was assigned to defendant, Poston, who brought suit thereon, returnable to the January term, 1826, of the county court of Montgomery. At the return term Baily confessed judgment, and Poston agreed to stay execution against him for six months, and judgment by default was taken against complainant. An execution having been issued against the complainant, he filed his bill to enjoin it. The court below decreed in favor of the complainant, and perpetually enjoined defendant from collecting the debt from complainant. From this decree an appeal was prayed and granted.

Thos. Washington, for complainant. Peay, as a surety, is exonerated under the circumstances stated in the bill, and admitted by the answer.

In the first place, there was a consideration for the agreement made by the creditor with the principal. That consideration consisted in the earlier acquirement of the judgment lien by Poston, in consequence of the confession of judgment by Baily, the principal, at the appearance term; and in the waiver of any defence, and the release of errors, by the confession of judgment. *McLemore vs. Powell*, 12 Whe. 454: Act of 1801, c 4, § 64. It is the right of the surety, when he apprehends danger, to compel the creditor to sue the principal, and obtain and enforce judgment. *Hays vs. Ward*, 4 John. Ch. Rep. 123.

This right, Peay was deprived of in this instance, by the agreement made between the creditor and the principal;

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which, being founded upon a consideration, was binding upon the creditor, and therefore legally prevented him from doing that, which the surety would otherwise have had the power to compel him to do.

It is not upon the ground of actual injury sustained by the surety, in such cases, that he is entitled to relief; nor is it necessary for him to show actual injury. It is upon the ground of potential injury, resulting from the violation by the principal, of any of his, the surety's rights; or from any act done by the principal, whereby the surety might in any way be misled or prevented from exercising his rights. The cases of *Lennox vs. Prout*, 3 Whea. 520, and *Bay vs. Talmadge*, 5 John. Ch. Rep. do not apply.

A. M. Clayton, for defendant. After the judgment, Peay became a principal debtor, and consequently has no right to relief. *Boy vs. Talmadge*, 5 J. C. R. 305: *Lennox vs. Prout*, 3 Wheaton: *Nayler vs. Moody*, 3 Blackford Rep. 92. Poston alleges in his answer, that he was the assignee of the note, and took it without knowing but that all the obligors were principals. He cannot for this reason be liable to Peay for indulgence granted to Bailey, unless it be proved that he had notice of the relation of the parties, as principal and surety. 3 Paige, 657: 1 Johns. Ch. Rep. 414.

2. If the delay is not greater than the defendant could have obtained by making defence to the action, the surety is not discharged. Theobald on Prin. and Surety, 128. This decision was made in reference to bail, but the principles of the contract of bail are the same as those of the common contract of surety. ib. 122.

GREEN J. delivered the opinion of the court.

This bill is filed by Peay, to enjoin a judgment obtained against him by the defendant, in the county court of Montgomery. It appears that Poston held by assignment a note for \$268, executed by Charles Baily, together with the complainant and Henry Small as his securities. A suit was brought against Baily and Peay to January term of the county court of Montgomery county, 1826. At the return term,

judgment final was taken by default against the complainant. Execution was not issued until after the October term, Neither Poston nor Baily informed Peay of the agreement to indulge or the confession of judgment.

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It is contended upon these facts, that the complainant is discharged in equity from any liability for this debt, because of the indulgence which was given by the defendant to the principal obligor in the note.

The principles of the case of *McLemore vs. Powell*, 12 Wheat. 557, as applicable to the present case, is an authority against the complainant. It is true the court say, that if the holder of a bill of exchange enters into a valid contract for delay without the assent of the endorser, it is to his prejudice, and he is thereby discharged. But why is it to his prejudice? Because, say the court, "he thereby suspends his own remedy on the bill for the stipulated period; and if the endorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him, as against the holder himself.

Now this reason why the contract for delay should discharge the surety, does not exist in the present case. The agreement of Poston to stay the execution against Baily, did not prevent Peay from obtaining judgment against Baily by virtue of the act of 1809, c 69. By that act, a surety, against whom a judgment may be rendered, may obtain judgment against his principal immediately, for the amount for which he has been so made liable.

The contract between the creditor and the principal debtor for a delay of execution after judgment, cannot affect the remedies of the surety, and he is not injured by it. If, instead of six months, Poston had agreed to wait with Baily ten years, we do not see that Peay would have been injured thereby. The means of securing himself would have been as open to him as though no delay had been agreed upon. It would therefore be against reason, that he should be released in consequence of an act no way injurious to him. This is in principle like the case of the holder of a bill, agreeing with the drawer for delay, without consideration. Such agree-

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ment not being binding upon him, the endorser, by paying the bill might reinstate himself in the ownership of it, and thereby entitle himself to a personal remedy on the bill against all antecedent parties. 12 Wheat. 556. And because he has this remedy to secure himself, it is correctly holden, that such agreement for delay does not discharge him. The reason for discharging a party in such case would be stronger than in the one under consideration; because in that case he must pay the money before he could have a remedy against the antecedent parties; but here he is required to do no such thing, but may forthwith upon the rendition of judgment against himself obtain one by motion against his principal.

It is alledged the complainant was misled, and induced to neglect his interest, by the commencement of the suit by Poston, and his supposition, that he would prosecute it rigorously to execution. If that be true, it was his own fault. He had no right to depend on the plaintiff in that case. He had the means of securing himself at his own command; and if he failed to do so, blame can attach to no one but himself.

In addition to the above view of the case, it may be observed that had the agreement for delay not been made, Baily would probably have kept off the judgment, by defending the action, as long as the six months agreed on. And when the delay agreed on is not greater than could be obtained by defending the action, it would be against reason as well as authority to discharge the surety, for such agreement would do him no injury. Theob. on Prin. and Sur. 216: Law Lib. 128. We are of opinion that the decree of the circuit court is erroneous, and that it be reversed, and that the defendant have judgment against the complainant and his security for the injunction.

Decree reversed.

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MAURY and WIFE vs. LEWIS et al.

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The issuance by the commissioners of a certificate land warrant to a person not entitled thereto, is not conclusive upon the rights of the real owner.

The act of 1807, c 2. empowered the commissioners to decide upon the validity of claims presented for adjudication, but their decision and the issuance of the certificate, do not affect the rights of persons having conflicting claims.

A court of chancery has jurisdiction to examine into the execution of the power conferred by the act of 1807, c 2, upon the commissioners to adjudicate land claims.

Where the bill alleged that the defendant received certificate land warrants for land granted to the ancestor of complainant's, which lands "were lost by the interference of an older and a better title in one Ezekiel Norris or some other such like cause:" Held, that this was a sufficient allegation of the complainant's right to the certificate under the provisions of the act of 1807, c 2.

When the statement of the bill is defective in not showing the complainant's right, but it calls upon the defendant to set forth his title &c. and the answer states with precision all the facts, &c. from which it appears the complainant is entitled to relief, the court will decree for complainant, upon the case made in the answer.

The defendant sold and appropriated certificate land warrants belonging to A. A filed a bill to recover the proceeds: Held, that the defendant could not avail himself of the act of limitations, without pleading or relying upon it in his answer.

The clerk and master in taking an account is bound to conform to the directions of the decree. Evidence taken before him which changes the complexion of the case as it appeared before the chancellor, and which had it been before the chancellor would probably have caused a different decree, cannot be heard, nor can it be noticed upon an appeal.

The facts of this case are stated in the opinion of the court.

F. B. Fogg, for complainant.

T. Washington, for defendant.

GREENE J. delivered the opinion of the court.

The case shows that two grants were issued by the State of North Carolina in 1794, to Elizabeth W. Lewis for 2500 acres each, calling for land in what is now the county of Lincoln. Elizabeth W. Lewis intermarried with W. C. C. Claiborne, and died in 1804, leaving no issue. The complainants, and the defendant Mary Ann Lewis are her legal representatives. In the year 1815 an execution was issued against Wm. C. C. Claiborne and levied upon two tracts of

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land in Lincoln county, supposed to be covered by the aforesaid grants, and the interest of said Claiborne in said lands was sold by the sheriff and purchased by the defendant Wm. B. Lewis and Charlotte Lewis for the sum of \$100. It was ascertained after this sale that the lands called for in these grants could not be identified, and upon the production to the commissioners of the affidavit of the surveyor, of the sheriffs deed and the grants, certificates were issued to the said Wm. B. Lewis and Charlotte Lewis, on the 23d December 1815, for said 5000 acres, which were never located by them, but which in 1816 they sold for forty cents per acre, amounting to \$2000. The bill prays that the defendant Wm. B. Lewis account for the proceeds of the warrants. The answer submits to an account for the one half, Charlotte Lewis having received the other half, and states that the defendant would have paid complainants without suit had he been applied to on the subject.

The cause came on to be heard upon the bill, answers and replication, when the chancellor directed that the defendant, Wm. B. pay to the complainants one fourth of the price of the said warrants, and to the other defendant, Mary Ann Lewis, another fourth part after deducting from each part one fourth of the expenses incurred by the defendant in procuring said certificates, and that the clerk and master take an account and ascertain the expenses, and report the balance due the complainants with interest from the time the warrants were sold, up to the time of taking the account. The clerk and master reported the one fourth of the land warrants sold in 1816, to be \$500, and one fourth part of the expenses to be \$31 12½ which being deducted left \$468 87½, upon which sum interest was calculated up to the time of taking the account. In examining witnesses before the clerk and master, it appeared that Wm. C. C. Claiborne did not die till 1817, and that Elizabeth W. his wife gave birth to a living child, which died before its mother. It is conceded on all hands that Wm. B. Lewis and Charlotte Lewis acquired no title to obtain for themselves the certificate warrants in question, in virtue of their purchase at the execution sale, but it is contended for the defendant that this question having been adjudicated upon by the commissioners, before whom he appeared in a charac-

er which he really sustained, that of purchaser at execution sale, and the certificates having been issued to him, this court has no jurisdiction to reverse that decision and to adjudge the right in favor of complainants. In support of this position, the case of *Lloyd vs. Lord Trimblestown*, 6 Cond. Eng. Ch. Rep. 152, is cited and relied on. That was an award of the British commissioners under the conventions of 1814 and 1815, between the British and French governments, and the act of Parliament 59 Geo. III. c 31, relative thereto. The vice chancellor in giving his judgment observes; "My opinion therefore is that this is a case in which the award of the commissioners is final so far as the jurisdiction of the court is concerned. For I think that except in cases of trust or fraud, it was intended that the adjudication of the commissioners should be final."

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Whether this be the doctrine of the court of chancery in England or not, it is perhaps not necessary now to enquire. It may be remarked, however, that Lord Eldon's observation in *Hill vs. Reardon*, seems inconsistent with the principle above laid down. In that case, 2 Rus. 629, he says: "If the French government had paid 100,000 francs to B as entitled under the will of A, and it turned out that C D was the person actually entitled under that will, could it be said that the jurisdiction of this court was excluded in such a case."

But be this question settled as it may in that country, the contrary doctrine is held by the supreme court of the United States in *Comegys vs. Vasse*, 1 Peter's Rep. 212, and by this court in *Pinson vs. Ivey*, 1 Yer. Rep. 296. The late chief justice of this court it is true, dissented in the latter case and delivered an opinion in accordance with the position now assumed by counsel. But the argument of the same counsel, sustained as it was by a majority of the court, settled the question against his opinion.

That decision has been followed ever since, and many cases have been determined upon the authority of it, so that it may be regarded as the settled law of this court, that the issuance of a certificate land warrant to a person not entitled thereto, is not conclusive upon the rights of the person actually entitled. The act of 1807, c 2, empowered the com-

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let in the evidence upon which it is now sought to reverse his decree, the application would have been refused. . Besides the opposite party is not expecting any such evidence. He comes to investigate the matters of account referred to the master upon the principles of the decree, and would be taken by surprise if this evidence were now noticed. It cannot therefore be looked at for any purpose, and ought not to have been taken by the master. He was authorised to take no testimony except that which was relevant to the matter referred to him in the decree. Any other evidence is taken as much without authority, and is as little to be regarded as though it were found in voluntary affidavits, sworn to before a justice of the peace.

We think there is no error in the decree, and order it to be in all things affirmed.

Decree affirmed.

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BELCHER vs. BELCHER.

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If no undue or improper means be used by a son to procure a voluntary deed from his father, the mere fact that the father regarded him with more favor than another child, and that the deeds were executed when the father was in some degree intoxicated, but was not insensible of what he was doing, will not be sufficient to set it aside.

To authorize the court to set aside a deed, merely on the ground that the party making it was intoxicated, it must appear that the drunkenness was excessive, so that the party was utterly deprived of the use of his reason and understanding.

Fraud, in a court of equity properly includes all acts, omissions, and concealments, which involve a breach of either legal or equitable duty, trust, or confidence justly reposed, and are injurious to another; or by which an undue, or unconscientious advantage is taken of another.

Equity will not only interfere in cases of fraud to set aside acts done, but will also, if by fraud acts have been prevented from being done, interfere and treat the case exactly as if the acts had been done.

A father conveyed by separate deeds all his property to his sons A and B. To A he gave however a much larger portion than to B. B was greatly dissatisfied, believing the arrangement to be inequitable, and he threatened violence to his brother and to the negro property conveyed to him. The father alarmed, lest B should do some act of violence to A, or to the negroes, solicited A to do something to pacify B. It was finally, at the solicitation of the father, agreed between A and B, that they should both burn the deeds executed by their father to them, re-vest the property in the father, and let him dispose of it by will. In pursuance of this agreement they both professed to throw their deeds in the fire. A however retained his, and burned only a copy. The father and B both supposed he had burnt the original. The father afterwards made a will, dividing the property nearly equally between them. The father and B having died, A, after their deaths brought forward his original deed, claiming the property therein, a part of which had been devised to B: *Held*, that this was a fraud in A upon the rights of B, which was relievable in equity.

Quere, Whether acts *in pais* by A, inconsistent with the existence of a title in himself for the same property, constitute an estoppel.

The facts upon which the court predicated its judgment in this case, are stated in the opinion delivered by Judge Green.

James Campbell & W. E. Anderson, for complainant. 1. Wyley Belcher was guilty of no fraud in procuring the deeds from his father. It is true his father was somewhat intoxicated when the deeds were executed, but not so much so, as not to perfectly comprehend what he was doing. Unless the party is deprived of the use of his reason or understand-

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ing by intoxication, or unless some unfair and undue advantage is taken of his situation, equity in such case will not relieve. 1 Story's Eq. 235: 3 Hay. Rep.

2. Wiley, by retaining his original deeds, and burning only copies was not guilty of a fraud in a legal sense. His brother was a man of violent temper and dangerous when excited. If Wiley to prevent personal violence or injury made the agreement, it was not binding on him. No legal injury was done to Allen. He had no right to the property; the old man had fairly conveyed it to Wiley. The agreement to burn the deeds and reinvest the property in the old man, was without legal consideration, and could not have been enforced against Wiley. If so, his retaining his original deed and burning the copy was not a fraud, for fraud to be relieved against must be operative as well as intended.

3. Wiley Belcher's acts, subsequent to the death of his brother and father, cannot by any known principle of law operate as an estoppel.

R. J. Mcigs, for Allen Belcher's representatives. The court ought to refuse to set up Wiley Belcher's deeds, because Wiley's conduct in the affair of procuring them was clandestine and inequitable; and in procuring Allen to assume a personal responsibility to a large amount of his own debts, by pretending to destroy the deeds, was deceitful, treacherous, and grossly fraudulent. And to grant him the relief he asks, would be for this court to become the promoter of subtlety and circumvention in the transactions of men, instead of the vindicator of candor and purity. At least, the court will leave him to the law. Francis' Maxims, Maxim 2: Story, § 59, 60.

2. Wiley's acquiescence in Allen's adverse title, under the will, for nearly eighteen months, operates as an estoppel, *in pais*, to his present demand. Co. Litt. 170 b, 244 b: Law Lib. Page 59, 60, top. Every man is bound to speak and act according to the truth of the case, and the law will presume he has done so, and will not allow him to contradict such a reasonable presumption. Fonb. b 1, c 2, § 13: 4 Kent 261, note d. Both having entered and enjoyed

under the will, they are reciprocally estopped. Law Lib. **NASHVILLE,**
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3. But the court ought to annul these deeds, and ought to decree the title of the property to Allen's representatives, because they constitute a cloud upon Allen's title, which is entitled to the protection of this court. Allen gave a full consideration to entitle him to an equal division of his fathers estate; a consideration equivalent to the sum advanced by Wiley in 1821, for the negroes; namely, becoming responsible for one half of Wiley's proper debt for the land, and for one half of all his father's debts besides. Story's Eq. § 437: *Hamilton vs Cummings*, 1 John. Ch. R. 517: 1 Hovenden's supplement, 17, note on *Coleman vs. Sorrill*, 1 Ves. 50: 17 Ves. 111, *Hayward vs. Dimsdale*.

This consideration having been actually paid, the will having been made in accordance with this contract, and the contract itself having been performed, and the property divided accordingly, entitle Allen to have the deeds of January 10, 1829, destroyed, and this court will consider as done what ought to have been done. Story's Eq. § 61, and authorities cited: Fonb. b 1, c 6, § 9: Francis' Maxims, Max. 13.

GREEN J. delivered the opinion of the court.

By the several bills and answers, and the proof in these causes, it appears that Ferrell Belcher, previous to the year 1820, resided in Twiggs county in the State of Georgia, was a thriving farmer, owning several tracts of land and eight negroes. He had only two children, both of whom were sons, Wiley and Allen. Wiley was elected sheriff of Twiggs county in 1820, and when that appointment expired, he was in 1822, elected clerk of the same county. In both of these offices Allen was his deputy. By these offices Wiley made money, to a considerable amount. The money thus made was put into the hands of Ferrell, the father, who laid it out in the purchase of negroes, taking title to himself.

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In the fall of 1824, Ferrell Belcher purchased of John Walker a tract of land of six hundred and forty acres, in Marion county, Tennessee, for \$5000, for which he executed five several notes for \$1000 each, with his son Wiley for his security; the first payment to be made in 1826, and the others in each successive year thereafter. Ferrell removed to Tennessee and resided on the land purchased from Walker. He also became owner of a house and lot in Jasper, and of several other tracts of land in Marion county. Previous to 1829, both the sons had married, and Wiley lived in the house in Jasper, and kept tavern, and Allen resided on the plantation with the old man. The tavern was supplied with provisions principally from the plantation.

On the 10th of January, 1829, Ferrell Belcher conveyed by deed of gift twenty-one negroes, by name, to Wiley, leaving only six undisposed of; he also, at the same time made Wiley a deed for the Walker tract of land, expressing a consideration of \$1000. Previous to this time Ferrell had become addicted to drunkenness, and had been at the house of Wiley from the 24th of December preceding, till the time the deeds were made; during all this time he had access to spirituous liquors and was in a greater or less degree of intoxication. But on various occasions afterwards, he declared that Wiley ought to have the property, that he had been instrumental in acquiring it, and that he should not die with a good conscience, unless Wiley obtained it. Wiley was an industrious, intelligent, thrifty man. Allen was honest, high-minded, but he had an irritable temper, and when excited was a dangerous man. About the time these deeds to Wiley were made, Allen procured a deed from his father for the house and lot in Jasper, four negroes, and probably other property. He was exceedingly dissatisfied with Wiley for obtaining his deeds and threatened violence to his brother and to the negroes, unless the deeds were given up. Ferrell was alarmed, unless Allen should do Wiley or the negroes some injury, and solicited Wiley to do something to pacify him. The brothers had an interview, the father being present, in which Allen demanded that the deeds should be surrendered. Wiley refused to do this, and they parted in an-

ger. In a day or two afterwards they met again, and it was agreed that they should both burn their deeds, and let the old man make a will. In pursuance of this agreement they both professed to throw their deeds in the fire. Wiley, however, retained his, and burned copies only. This was about 15th January. After this Ferrell Belcher made several wills, the last one of which, dated 2d day of March, 1829, gave all his property, real and personal, after payment of debts, to his wife for life, and after her death he devised it to his sons. To Wiley he gave two houses and lots in Jasper, purchased from Arnett, 219 acres of land bought from Coulter, fifteen negroes by name, the southern half of the Walker tract, containing 320 acres, two tracts in Twiggs county, Georgia, containing 202½ acres each, and his cotton gin in Jasper. To Allen 320 acres of land, the northern half of the Walker tract, twelve negroes by name, 490 acres of land in Erwin county, and 490 acres in Wayne county, Georgia, and the household and kitchen furniture, and hogs. The horses, cattle and growing crop were equally divided between them, and they were required to contribute equally to the payment of his debts, and especially the debt to Walker. Two days after the execution of this will Ferrell Belcher died. During the life time of Ferrell the two notes to Walker, which were first due were paid, and the sum of \$441 93 cts. had been paid on the third. Suits had been brought up on the third and fourth notes against Wiley alone; and Allen, after the deeds had been burned, by consent of the counsel who managed the causes for Walker, signed these notes and had his name inserted in the proceedings as a defendant. At the May sessions of the county court the suits were revived against Allen and Wiley, as executors of Ferrell, and at the August session judgments were entered against them on the third note, for \$589 12 cents, debt and damages, and \$12 02 cents costs; and on the 4th note for \$1076 66 cents, debt and damages, and \$12 02 cents costs. On 12th October, 1829, they joined in filing a bill of injunction against Walker, on account of an adverse claim, which had been set up by ejectment against Allen, who was in possession. Allen then removed to Georgia, and afterwards, on the 12th day of

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April, 1830, judgment was rendered against him and Wiley, on the 5th note, for \$1115 50 cents, and on the 14th of that month he died. Old Mrs. Belcher also died in the same month, having until then retained the possession of the property devised to Allen. William Crocker, attorney in fact for Allen, being at her house when she died, took possession with the knowledge and consent of Wiley, of Allen's half of the Walker land, as devised in the will, and also of the negroes devised to him, among whom were seven of those that had been conveyed by the deed of the 10th January, 1829, to Wiley. These negroes were placed in the hands of Alexander Coulter that they might be in reach of the execution on the Walker judgments and be applied to the satisfaction of Allen's half of that judgment. The negroes which were devised to Allen, and which were not conveyed to Wiley, were kept out of the way, and the executions were levied on the seven, who had been included in Wiley's deed. Wiley forbid the sale, and exhibited for the first time since the agreement to burn them, his deed of gift for these negroes. The sale however took place, and five of the negroes were bid off for William Crocker, the father of Allen's widow.

At the August term, 1830, of the Marion county court, the will was produced and offered for probate, and Wiley filed a *caveat*, but afterwards withdrew it, and the will was proved and recorded; neither Wiley nor Allen, nor W. J. Standifer, who were named as executors, have ever qualified as such, nor has administration been granted with the will annexed. Wiley agreed that Crocker should take into his possession the negroes that were devised to Allen, and they went together and offered the Walker tract of land for sale. Wiley proposed to sell the half devised to him, and Crocker the half that was devised to Allen. Wiley also took the part of the horses, cattle and growing crop, which was devised to him in the will, he also sold a house and lot in Jasper, which was devised to him in the will, but which had been conveyed to Allen by the deed he had destroyed. In December, 1830, Wiley filed his bill to set up his deeds against Allen's representatives and William Crocker. Allen's representatives also

filed their bill to have the deeds of Wiley set aside and cancelled, and the property decreed to them. Both causes were heard together, and a decree was made in favor of Allen's representatives, and Wiley's bill was dismissed. An appeal was prayed and granted, but the appellant failing to give bond and security in the time limited, his appeal was at a former term dismissed. A petition was filed for a *certiorari*, to bring up the cause to be heard in this court, as upon an appeal. This motion has been continued several terms, and now the question is, shall the *certiorari* be granted. The reason why the security was not given, is deemed sufficient; two weeks were allowed by the chancellor within which the security might be given. One of the counsel wrote to the appellant by mail on the day the decree was pronounced, or the day afterwards, informing him of the result of the causes, and what he was required to do. The letter did not come to hand till several days after the time limited for giving the bond had expired.

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The next question is, whether the applicant for the *certiorari*, Wiley Belcher, has merits in his cause? As the whole record is before us, after a very full and able argument on both sides, we will examine the questions as they arise in the order of the transactions. 1st. It is insisted by the representatives of Allen Belcher, that Wiley Belcher committed a fraud, in obtaining his father's signature to his deeds. This position is attempted to be supported upon the ground, that the deeds gave Wiley much more than half the estate the old man possessed in disregard of the equal claims which Allen had on their father's bounty, and that Ferril was induced to execute them when drunk by the fraudulent contrivance of Wiley. These allegations were not supported by the evidence in the cause. Although it is true that the old man was addicted to drunkenness, and was most probable to some extent intoxicated, when he executed the deeds, yet the proof is satisfactory, that he was not in a condition to be insensible of what he was doing. He was certainly not in a situation to exercise a very sound discretion; still we are satisfied that in this instance, he did what he deliberately desired to do. Many witnesses on both sides testify to the old man's frequent declaration, that Wiley ought

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to have the property, and that he would not be content unless that disposition were made of it. If there had been no other ground for this wish, than mere caprice, still the old man had a right to act with his property as he chose. If Wiley made use of no undue means to procure the deeds, the mere fact that his father regarded him with the most favor, and was disposed to give him the larger portion of his estate, furnishes no ground of objection to the transaction, although he was in some degree intoxicated, for there is not the slightest proof that Wiley used any contrivance or management to draw him into drink, or that he took any unfair advantage of his state of intoxication to obtain the deeds. To authorize the court to set aside a contract, merely on the ground that the party making it was drunk, it must appear that the drunkenness was excessive, so that the party was utterly deprived of the use of his reason and understanding. Story's Eq. 235. It is proper also to add, that the old man in speaking of his desire that Wiley should have this property, frequently gave as a reason, that the means by which it was obtained, were contributed to a considerable extent by him. This fact having been also established by other proof, repels the presumption of fraud, and furnishes a reasonable ground for his father's preference.

The next inquiry is, did Wiley commit a fraud in making the agreement to burn his deeds, and then by failing to comply and burning copies only, induced Allen to burn his deed. We cannot resist the conclusion that he did. A very ingenious argument is made by the counsel to justify him for the deception which he practised, but to hold that the end sanctifies the means is exceedingly unsound in morals and dangerous in practice. The law, as well as the Bible, enjoins that a man should "speak the truth in his heart;" he must neither tell a falsehood, nor by any action practice a deception on his fellow man to his injury. It is true, Allen's conduct in threatening his brother and distressing his Father was highly reprehensible, nor would there have been any ground of equity against Wiley, if he had openly refused to carry into execution the agreement which had been obtained from him. For in that case he would have received no benefit, nor

would Allen have sustained any injury, and therefore no consideration would have existed, upon which to enforce the agreement. But by pretending to comply with the agreement on his part, he induced Allen to comply in good faith and to burn his deed. Now it is easy to see, that Allen was placed in a much worse situation by the destruction of his deed, than he would have been in had he retained it. If he had retained his deed, the property conveyed to him would have been no more subject to the debts of his father than that conveyed to Wiley. If the property of the one had been sold by the creditors of his father, the other would have been bound to contribute his proportion of the amount of such debt. But by the destruction of Allen's deed, the whole of the debts are thrown upon that portion of the property which had been conveyed to him. Wiley would be liable to pay nothing, until all the old man's property, not included in his deed should be exhausted, therefore, instead of being liable for half the debts, as he would have been, had Allen retained his deed, Wiley, by inducing its destruction, is exempted from the payment of a dollar, and Allen, even should his father die intestate, is saddled with the whole of his debts, instead of the proportion he would have been liable to pay had he retained his deed.

Whether contribution in such a case would be enforced or not, cannot affect the force of the argument. For we are unable to see from the facts in the cause, which deed was first executed. Mary E., the widow of Allen, says that Wiley's was first executed; and Wiley in his answer says, that he heard the deed to Allen was made before the execution of his deeds. If in such case there would be no contribution, then, as Wiley was a co-obligor in the notes to Walker, and was alone sued, he would have been compelled to pay the entire debt, and if as he says Allen's deed was oldest, he would have been exempted from the payment of any part. Thus, instead of being liable to pay the whole Walker debt, had Allen retained his deed, by procuring its destruction, the liabilities are changed, and the property of Allen, had his father died intestate, would have been liable for the whole. There is another view of this transaction, in

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which the injury is still more manifest. By the destruction of Allen's deed, his father became revested with the title to the whole of the property which he had conveyed to him, and being thus vested with the title, he had a right to dispose of it as he pleased. He might convey it to another, or devise it to others, if he thought proper, and Allen would have no right to complain of him, or of his subsequent donee or devisee. True, he had been induced to give it up, by a deceptive artifice, but neither the old man, nor his subsequent donee, could have been chargeable with it. It would have been a complete loss to him, in consequence of the destruction of his deed, and that destruction produced by the artful and false pretence of Wiley, that he had also destroyed his deeds. It is no answer to the foregoing view of the case to say, that these evils have not in fact come upon Allen. The character of Wiley's conduct is to be judged of by an examination of what would have been the legitimate legal consequences of that conduct. It is said Wiley has in fact paid half the debts, and this appears from the evidence to be true. But why did he pay any part of them? No one will pretend that he was bound to pay a dollar, if his conduct about burning the deeds were innocent. If his deeds are not vitiated by his agreement to burn them, and the deception he practised on Allen, the property conveyed by them cannot be rendered liable to the old man's debt, while there remains other property unconsumed. If, therefore, Wiley has paid half the debt to Walker, as he paid it as the old man's security only, should his deeds now be declared valid, he may yet collect the whole of it from that part of the old man's estate which was not conveyed to him. What is to prevent him? I know of no principle of law or equity that could interpose against him. It must be seen, therefore, that Allen is deeply injured, or which is the same thing, is exposed to injury by the contrivance and deception of Wiley.

But it is asked, what benefit the destruction of Wiley's deeds would have been to Allen? It would have vested the property in the old man, and there would have been a possibility that he might die intestate, or by will devise part of it to Allen. But this, it is said, he had no right to claim of

his father, and therefore it did not necessarily follow, that he would be benefited by the destruction of Wiley's deeds. In answer to this it is enough to say, that it would have placed them on equal footing. By again placing his own property at the disposition of his father, Allen was risking all without the possibility of gaining any thing. Had Wiley's deeds been destroyed, he would have had the prospect of benefit, either by a devise from his father, or by his dying intestate. But in truth, the agreement to destroy the deeds, that the old man might make a will, was made at the instance of the father, in order that a disposition of the property more favorable to Allen might be made. This promise to provide for him by will, and Wiley's agreement to burn his deeds constitute the reason why Allen's was destroyed, and therefore Wiley's refusal was directly injurious to Allen. If so, he is guilty of fraud. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments, which involve a breach of either legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. 1 Fonb. Eq. b 1, c 263, (note 8): 2 Vez. 155, 156: 1 Story's Eq. 197.

It may be safely assumed, that Wiley was guilty of a concealment in violation of a confidence justly reposed, by which an undue advantage is obtained over Allen. He induced his brother by his deception to part with property to which he was entitled, without any corresponding benefit, and himself was thereby relieved from the legal duty of paying half his father's debts, for which he was otherwise liable. He deceived his father, and induced him to devise property he had before conveyed to Allen, to himself, the testator making provision for Allen, by devising property, which is now claimed by these deeds. True, the counsel in the argument of this cause, say the court may make Wiley account for the house and lot, crop, &c. which he has received and appropriated under the will, and thus place the parties in *statu quo*. But Wiley's answer holds a very different language. He insists the house and lot were paid for with property that was his own, and therefore, that the house and lot were his,

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and that for this reason he ought to hold them. But if it were possible to do so, this is not a case where the court can act upon the rights of the parties, and place them in *statu quo*. Either Wiley is guilty of a fraud, or he is not. If no fraud has been committed, there is no ground for relief against him. But if he be guilty of a fraud, then clearly he ought not to obtain the benefit of his fraud, as though he were innocent. Entertaining this view of the facts of the case, the legal consequence is, that Wiley's deeds must be cancelled and rendered wholly void. For a court of equity considers as done, what ought to have been done. It will not only interfere in cases of fraud, to set aside acts done, but will also, if by fraud acts have been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done. 1 Jac. & Walk, 96: 1 Story's Eq. 198. As the opinion of the court, upon the question of fraud, settles the rights of the parties, it is unnecessary to discuss the question, whether the subsequent acts of Wiley, in reference to the property devised by the will, are such as would estop him from claiming by virtue of his deeds. Several of these acts, such as joining Allen's agent in offering the land for sale, and giving up to him, or consenting that he should take possession of the seven negroes that had been given to himself by the deed, are inconsistent with the existence of a title in himself for the same property, and we are strongly inclined to think would constitute an estoppel to his present claim. Law Lib. Part. 147, mar. page: 4 Kent's Com. 261, 3d edit. note (d) and the authorities there cited.

The court is of opinion, that the petitioner, Wiley Belcher, has shown no ground for relief in this court, and that his application for a *certiorari* be refused and that the decree of the chancery court be in all things affirmed.

Decree affirmed.

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WOODS vs. MCGAVOCK.

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Before a creditor can, by virtue of the acts of 1820, c 11, and 1823, c —, redeem property sold at execution sales or under a deed of trust, he must obtain a judgment against the debtor whose property has been sold.

Where a creditor whose debt was secured by a deed of trust, verbally promised to A that if he would purchase the property at the trust sale, and bid a certain amount for it, i. e., the creditor, would not redeem it for any balance due to him by the debtor, on the faith of which promise A did bid the amount and make the purchase, and made valuable improvements on the land: *Held*, that such creditor would not be permitted afterwards to redeem the land.

The facts of this case, necessary to be stated, are contained in the opinions of Judges Green and Reese.

F. B. Fogg and E. H. Ewin, for complainant.

Geo. S. Yerger and W. E. Anderson, for defendant.

GREEN, J.

This bill is brought to enforce a re-conveyance of certain tracts of land, which were sold as the property of Samuel Wright, under a deed of trust, which land was purchased by the defendants, and is sought to be redeemed by the complainants, who claim the right to do so, because they say they are *bona fide* creditors of said Wright, and have tendered to the defendants the amount of money, which by law, they are entitled to receive. The right of the complainants to redeem is resisted upon several grounds. The first ground we shall notice, upon which the defendants resist the bill, is, that the complainants agreed they would not redeem, and thereby induced the defendants to make the purchase, and to expend large sums of money in constructing improvements on the land. The lands were sold by virtue of deeds of trust, which were made to secure debts, to a large amount, due the complainants. They expected to experience a loss of part of their debt, and were anxious that the property should bring the highest possible price. They did not wish to become purchasers of the land, and would have preferred losing a considerable amount of the debt, rather than to bid

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it in. On the day of the sale, their agents, Mr. Ewing, the trustee, and Mr. Bradford urged the defendant's to bid. They were told, that if they would bid \$7000 for the land, there was but little doubt, but that the complainants would wait one, two or three years for the money; and Mr. Bradford says, that his impression at the time of the sale was, that the complainants would not redeem the property, and he has no doubt he expressed that opinion to the defendants in strong terms; that his impression is, the complainants authorised him to say to the defendants that they would not redeem, and that he did say so; as to that, he will not be positive, but that when he heard the property would be redeemed, he was very much surprised. Mr. Erwin states, that he had heard Mr. Robert Woods say, that he was willing to make a sacrifice rather than to be troubled with the property, and that Mr. Woods had told him, that he (Woods) had, in a conversation with one of the defendants, told him he would not redeem the land, or did not expect to redeem it. Afterwards he said to witness, that this remark was a voluntary one, and formed no part of the consideration in the purchase, or that it was after the purchase was made. Mr. Ewing, the trustee, states, that when the deed was about to be executed by him to the defendants, Mr. Robert Woods and the defendants talked a great deal about the probability of a redemption, and that Mr. Woods stated, that Ogden Ferguson & Co. were the only creditors that had a debt that would justify a redemption. When asked to release his claim on Wright to the defendants, he stated, as one reason why he would not do so, that he hoped to get a negro (belonging to Wright) that had runaway, and no other reason is recollected to have been given. It is admitted by complainants, that defendants have made considerable improvements on the land since they purchased it, and before they knew complainants entertained any purpose of redeeming it. This evidence, we think, proves beyond a doubt, that one of the complainants gave assurances to the defendants that no redemption would be made of the land in controversy, and that acting upon this promise, large expenditures have been made in improvements on the land. It is true no positive promise not to redeem is

expressly proven by any witness, except Mr. Erwin. But his statement is clear and unequivocal, and proves the acknowledgement of Mr. Woods, that he had said to one of the defendants, that he would not redeem. He afterwards told Mr. Erwin, that the promise formed no consideration for the purchase, or was after the sale. But whether it was made before or after the sale is not material, if the defendants acting upon the faith of it afterwards expended their money in making improvements. There is strong reason to believe, however, that a like promise was made before the sale. Mr. Bradford's impression is, that he told the defendants before the sale, that Mr. Woods authorised him to say to them, that if they would bid \$7000 for the land he would not redeem it. The subject of the redemption was a matter of solicitude with the defendants, and they had a great deal of talk about it with Mr. Woods, at the time they received the deed for the land. Mr. Woods at that time mentioned Ogden Ferguson & Co., as the only persons who were likely to redeem. It is clear that the defendants must have had the most satisfactory understanding that he would not redeem, or their solicitude would not have had such entire reference to the probable conduct of others. When we add to this the admitted fact, that he did make such promise after the sale, the conclusion is satisfactory, that a like promise was made before the sale, through Mr. Bradford, his agent. We have then the case of a purchase made at the solicitation of the complainants, under a promise not to redeem the land, and that promise repeated after the purchase, inducing the expenditure of considerable sums in improvements, and after all this an attempt to enforce a re-conveyance, under the statute by a tender of the purchase money and ten per cent. interest. Can such an attempt find countenance in this court? We answer unhesitatingly, it cannot. There is now, to be sure, an offer to pay any sums which may have been expended in improvements, but if they were guilty of no fault there is no ground upon which this court could require them to do so; and if guilty of such wrong, as to justify the imposition of such a condition, this court will not assist them to reap the benefit of a judicious improvement, enhancing

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the value of the property greatly beyond its cost, on payment of the money expended. If this were done, the creditors of a debtor, whose land might be sold, would be encouraged to stand by, promising not to redeem, and stimulating the purchaser to make improvements, and then, if they succeeded in greatly enhancing the value of the property, they would come in and by redeeming, obtain a premium for their breach of faith. This is what no man, unbiassed by the force of his own interest would ask, and what no court of chancery ought to permit. But it is said, this promise is not obligatory, because it was not made in writing, and to enforce it would be against the statute of frauds. In answer to this, it may be sufficient to say, that the promise contains no relinquishment of any interest in land. The complainants had no interest in this land after the sale. They were in the situation of every other creditor of Wright, having by the statute the legal right to redeem the land upon the performance of certain conditions, but certainly having no interest in the land until the conditions were performed. The entire and absolute estate was vested in the purchaser, subject to be divested upon the terms prescribed in the statute, which gives any creditor a right to purchase the land, by the payment of the money bid at the sale and ten per cent. thereon.

The case of *Fay vs. Valentine*, 12 Pick. Rep. 43, fully sustains the defence in this case. That was the case of a purchase of a mortgage. There the party entitled to the equity of redemption, urged the defendants to purchase the mortgage, assuring him that it should never be redeemed. The purchase was made, and buildings erected upon the land at great cost and expense, before the plaintiff gave notice of his intention to redeem. It was objected, that the mortgagee could not relinquish his interest by parol. The court say, "most certainly he cannot, but no party, whatever may be his interests or legal rights, can have relief in a court of equity, unless his claim is founded upon the basis of good faith and justice. It is a familiar rule, that he who seeks equity must do equity. He must not expect the aid of a court of equity, to sanction the violation of his engagements, although "there may be no legal means to enforce them."

This case is directly in point, if authority were needed to settle a question so plain in principle. It is objected that it is against public policy to recognize and enforce a contract of this kind. There is a great difference between this case and the agreement of several, that they will not bid against each other at a public sale; such agreement would tend to depress the price of the property to be sold, and would injure the owner. But the natural tendency of this agreement was to enhance the price of the land. Who does not perceive that the right of the owner or his creditors to redeem land sold under execution, depresses the price below what the purchaser would be willing to give, if he knew he would get an indefeasible title? An assurance, therefore, that no redemption would take place, would naturally have the effect of increasing, rather than depressing the price. The foregoing view is sufficient to determine this case, but as the question whether the creditor, who shall be permitted to redeem shall not be a judgment creditor, is one in which the country is greatly interested, we think proper to consider that also.

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Continuation of the opinion by REESE, J.

To constitute a person a *bona fide* creditor, within the meaning of the act of 1820, c 11, § 3, 4, 5, so as to authorise him to redeem from the purchaser of land, sold at execution sale, is it necessary that he should have obtained a judgment against the execution debtor, the original owner of the land? An attentive perusal of the case of *Hawkins vs. Jamison*, will leave no doubt that so early as the time, when that case was before the court, this question, if it had arisen, would have been determined in the affirmative. The court repeatedly, and with apparent anxiety to fix in the professional and public mind the impression, state, that the debt "must be legally ascertained." Such too, we imagine, has been the current of professional thinking, as is rendered manifest by the fact, that for seventeen years, since the enactment of the statute, none other than judgment creditors, prior to this case, have sought in our courts of justice to assert their claim to redeem. These, however, are but persuasive considera-

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tions. It is readily conceded that the terms "*bona fide* creditor" do not necessarily and by their proper force mean judgment creditor. The terms are not usual in our statutes, and they recur with remarkable frequency in the three sections of the statute referred to, being repeated so often as nine times. We have no doubt, but that they were used restrictively, and not with a view to amplify and extend either creditors or their claims. It is no doubt true, as urged for the complainants, that the main object of the statute was to protect the rights and interests of the debtor; to secure to him if practicable, the redemption of his land; and if that were out of his power, the extinction, within the term of two years, of as large an amount as possible of *bona fide* debts. It was one of a series of measures called relief measures, adopted at the same session, and vindicated at the time by the pecuniary pressure and indebtedness of the period. To require a judgment, to resist a redemption by the debtor, or to authorise a redemption by one creditor from another, or from the purchaser, is perfectly consistent with the object of the act, while to dispense with a judgment, would tend to defeat the object of the statute, in embarrassing redemption by the debtor or other creditors. The debts were to be *bona fide*, that is subsisting, not barred by the statute of limitations, not paid, not released, without just sett off, untainted by fraud or illegality, honestly and equitably due, *ex equo et bono*. All this is involved in the terms *bona fide*, and how shall all this, so anxiously and repeatedly demanded by the statute be known and "legally ascertained," except by the prosecution of the claim to judgment? Again, before this statute, as well as since, real estate has by our system been guarded and protected for the owner with much solicitude. To subject it to sale, there must not only be a judgment and execution, but the personal property must be exhausted or not to be found, the land must be advertised and publicly sold at the court house. The title to land thus cautiously guarded in the hands of the original owner, the execution debtor, the moment a sale takes place becomes, according to the argument, for two years a sort of apple of discord, between the purchaser, the debtor, and his creditors, tossed to and fro

among them, now here, now there, without a judgment obtained, or other solemn act done. But to recur to the act:

It sets out with a judgment, an execution, and a sale; these solemn record evidences, and ministerial acts founded upon them, constitute the *termini aquo* of all that follows. The second section supposes there has been a sale, and that the debtor wishes to redeem; he may do so, says that section, at any time within two years, upon payment, or tender of the principal money bid at the sale, with ten per cent. thereon. So much for the act. But the case of *Hawkins vs. Jamison* decides, that he shall not redeem, if the purchaser be a judgment creditor, or the assignee of a judgment creditor, and wishes to retain, &c. This is by judicial construction, it is not in the act. But if you carry that decision further, and say that the purchaser may resist the redemption of the debtor, by setting up bonds, notes and accounts, which he has from all sides purchased, borrowed, or in some manner gathered in, making a mass of claims doubtful, difficult and complicated, is it not obvious that the main purpose of the statute would be effectually thwarted? The third section provides, that when an interest in land shall be sold at execution sale, and the owner thereof shall have other *bona fide* creditors, whose debts are not secured or paid, such *bona fide* creditor shall redeem, &c. "And he shall further offer and agree to credit the person whose estate was sold," &c. Where shall the evidence of this further credit be put? upon the note or account, in the possession of the redeeming creditor? What would that avail the debtor? Again, upon this being done, "it shall be the duty of the purchaser, or person claiming under him, to convey to said *bona fide* creditor said interest." How convey? What shall the deed recite? "Whereas, A B produced to me an account against C D, and also produced before me witnesses," or "a note of hand," or "a covenant to deliver horses" or "cotton," or "pork." Would not this be absurd? But the purchaser or person claiming under him, may resist and defeat the redemption, if he will pay or secure to be paid in six months thereafter, to such *bona fide* creditor, the sum proposed to be advanced by him. Who could or

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would venture to pay, or to secure the debt of another which had not been subjected to legal investigation and ascertainment? For it will be remarked, that this whole section contemplates interviews and negotiations touching the debts of a third person not present, or a party to these interviews and negotiations, and how, under such circumstances, would they without record evidence move in safety one single step?

The two following sections are subject to the same remarks, and furnish the same illustrations. This construction does no violence to the words of the statute, nor involves any departure from their meaning. The requirement is, that the creditor, or rather his debt, shall be *bona fide*. How shall this quality or character of the debt, so frequently and anxiously demanded by the statute, be ascertained? The act indeed does not in terms prescribe, but its scope and object, as well as the necessity of the case, and the reason and nature of things require that it should have been ascertained previously to redemption, by legal investigation, by a judgment. Under the act of 1801, c 25. where a creditor seeks to set aside a fraudulent conveyance, in a court of chancery, he is uniformly required to have previously obtained a judgment at law; so also, when a creditor seeks in a court of chancery to subject the equitable estate of his debtor, his character of creditor must have been ascertained in a court of law. Can it then be supposed, that this tribunal *in pais*, constituted by the act, and consisting of creditor, purchaser and debtor, shall have evidence of indebtedness less solemn, by which to operate upon the title to real estate? Surely not. Upon this ground, therefore, as well as upon that first mentioned, we think the bill of complainants must be dismissed.

Decree affirmed.

TURLEY, J., concurred.

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COOLEY vs. WEEKS.

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A tender made in bank notes, if not objected to on that account, is good.

Where a debtor, whose property has been sold at execution sale, attempts to redeem it from the purchaser, the latter, if his judgment has not been satisfied, has other *bona fide* debt due from the debtor, may credit the debtor with the sum proposed to be advanced, and may bid in the same manner, and to the same extent, as if the attempt to redeem was by a creditor under the 3rd, and 4th sections of the act of 1820, c 11.

Where property is proposed to be redeemed and the original amount is tendered, it is the duty of the purchaser to receive the amount and convey the property, or if he is willing to give more, he should propose an advance and credit his judgment with the amount thus bid or advanced.

Where the legal amount due to the purchaser is tendered to him by the debtor, he has no right to insist on the debtor's paying whatever amount may still be due him from the debtor before he will permit him to redeem, without offering to credit or discharge the debtor of the debt.

Where the purchaser, upon a legal tender being made to him, neglects or refuses to bid or advance any part of the debt still due him, he cannot do it after the expiration of the two years limited to redeem.

Where a legal tender has been made by a debtor to a creditor to redeem a slave, the former is accountable for hire from the time of the tender; but he may set off in equity against the hire, a judgment debt due to him from the debtor.

The facts upon which the judgment of the court is predicated are fully stated in the opinion.

W. Thompson and W. A. Cooke, for complainant.

A. M. Clayton for defendant.

GREENE J. delivered the opinion of the court.

The several bills, answers and proof in this case show that C. & W. Bayliss were judgment creditors of the complainant, Cooley, and that an execution in their favor was levied on a negro girl, Delia, the property of complainant, and that when she was sold, C. Bayliss, for C. and W. Bayliss, purchased her. The girl was sold the 25th day of May, 1825, and the 14th of January 1826, the defendants being judgment creditors to the amount of upwards of \$130, redeemed the said girl from Bayliss, paying him for his debt and ten per cent thereon, \$74 08½. Shortly afterwards and in the same month, Cooley agreed to sell the girl to Thomas D. Beauchamp for

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\$200, and it was agreed between them that Beauchamp should redeem the girl from Weeks, by paying Cooley about \$75 00. In pursuance of this agreement, Beauchamp tendered to Weeks a one hundred dollar bank note, out of which to take his own money, which Weeks refused to receive, and required before he would permit a redemption of the negro, that the sum he had paid to Bayliss should be paid him, and also the whole of his own debt. This was not done, and Beauchamp ceased to have any interest in the matter. After this Cooley procured an agreement from John Scarborough, by which the latter was to give him \$215 for the girl, and to redeem her from Weeks. Some informal offers were made to Weeks by Scarborough, but as Weeks constantly refused to permit a redemption except upon the terms before stated, nothing was done. After the two years elapsed within which the right of redemption existed, the defendants issued their execution against Cooley, crediting thereon only seven dollars.

Upon these facts the first question is, whether there was a good tender made to the defendants, by which the complainant became entitled to redeem the negro. The tender was made of a one hundred dollar bank note. No objection was made to the bank note, but it was refused because the defendant, Weeks, insisted he was entitled to receive a greater sum. The tender therefore was as good as though it had been made in gold or silver coin. *Ball vs. Stanley*, 5 Yer. Rep. 201: *Norris' Peake*. 432: 4 Espin. Rep. 267; 3 Term Rep. 554.

The next question is, whether the sum tendered was sufficient to entitle the complainant to redeem. By the act of 1820, c 11, § 2, a debtor whose land or negroes may be sold at execution sale, is authorised to redeem the same of the purchaser, or of any person who may hold under him, within two years from the time of the sale, by paying the sum bid at the sale with ten per cent. interest thereon, and such other lawful charges as may exist.

By the third section of the act, a *bona fide* creditor of the person whose property may have been sold, may redeem the same of the purchaser, by paying the money bid at the sale, and ten per cent. thereon, and crediting the debtor ten per cent. on the amount bid at the sale. By the fourth section it

is provided that if the purchaser at execution sale, or the person claiming under him shall also be a *bona fide* creditor to the amount proposed to be advanced on the bid at execution sale, at the time that any *bona fide* creditor may propose to make the advance, it may be at the option of such purchaser or those claiming under him to credit the debtor with the sum proposed to be advanced on the bid, and keep the property or surrender the same in the manner aforesaid, to such person offering to make the advance. It was decided in the case of *Hawkins vs. Jamison*, Mar. Yer. Rep. 83, that a proper construction of this act would authorise the purchaser at execution sale, or those claiming under him, to credit the debtor the sum proposed to be advanced by such debtor himself, when he might come to redeem, in the same way he might do under the 4th section, if another *bona fide* creditor were to offer to redeem. Judge Catron in that case says: "The meaning of the law must be, that if the debtor comes forward to redeem, the creditor, (who is also purchaser,) may say to him, I have an unsatisfied debt against you, and bid ten or twenty per cent. on my former bid and give you credit. I redeem the property at that, says the debtor. I advance the balance of my debt says the creditor. I still redeem says the debtor, and here the matter ends." The opinion of judge Crabbe in the same case expresses in substance the same view of this act with that of judge Catron.

We are not disposed at this day to attempt, by any reasoning of ours, an exposition of this act of assembly. It is very artificially drawn, and it may perhaps be difficult to tell what is the meaning of some of its provisions. We are content to act upon the exposition which the court have given in *Hawkins vs. Jamison*. We feel assured that the court in that case, by construing the fourth section as applying to the debtor, (who is not named in it,) in the same way that its terms apply to a *bona fide* creditor who may wish to redeem, have put the case in the most unfavorable condition for the debtor of which it is susceptible by any plausible construction. By this construction of the act, when Beauchamp came to redeem for Cooley, it was the duty of Weeks, upon receiving the \$74 08½, he had paid to Bayliss to convey the negro to

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Cooley, or if he was willing to give more, he should have proposed an advance upon the sum he had paid Bayliss, with which his judgment against Cooley should have been credited, so that Cooley might determine whether he would let the negro remain in his hands or still redeem, by paying the enhanced sum. This was not done, but a positive refusal was made to permit a redemption until his entire judgment should be paid, and this without any offer to credit Cooley by the amount of that judgment; nor was that the intention or meaning of Weeks in making the payment of it a condition to the redemption. This is shown by the fact that he subsequently had an execution issued against Cooley for the whole amount of his judgment, except seven dollars. He acted upon the opinion, that a debtor had no right to redeem until the whole debt of the purchaser were paid. In this he was clearly mistaken. We therefore think that the tender made by Beauchamp was such as is required by the act of assembly.

But it is said in argument, that Weeks may now bid the value of his debt, which is more than the negro was worth at the expiration of the two years, and by crediting Cooley with her value, he may retain the negro. There is no principle upon which this can be done. By the tender the negro became in equity the property of Cooley, and as Weeks refused to bid then but kept the negro in defiance of law, he cannot now require of Cooley the sacrifice of his right; besides at the end of the two years the rights of the parties were fixed. Cooley could not redeem afterwards, nor could Weeks advance on the price bid. After the end of the two years from the time of the sale, the act of 1820 could have no further effect, except in the enforcement of rights which were acquired under it during the two years. The tender which was made by Beauchamp and that spoken of by Scarborough, were made by them as agents of Cooley, and were so understood and treated by Weeks. It is true they both had a contract for the purchase of the negro, should she be redeemed, but neither of them acquired any interest in the negro by the contract. Weeks was the absolute owner of the girl. The law annexed a condition to the sale by which Cooley was allowed to repurchase within a given time. Until a tender was made

of the money which was required to be paid, he had no interest in the slave, either legal or equitable. These contracts therefore were necessarily prospective, and when they failed to obtain the negro from Weeks, could have no obligatory force, and were treated by the parties as nullities. We think, therefore, that Cooley is entitled to the negro girl slave Delia, and to an account for the value of her hire from the time the tender was made by Beauchamp to Weeks.

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But the defendants have a judgment at law against the complainant, and the slave in controversy would be liable to be levied on and sold for its satisfaction so soon as she may be delivered up to Cooley. Besides, the defendants in this case have acted under a mistake of the law, and not with any bad faith, or in disregard of what they knew to be the rights of the complainant.

We think therefore, that their debt ought to be paid out of the sum they may be chargeable with for hire, and that any balance thereof which may not be so discharged be a lien upon the slave. An account will be taken between the parties as above indicated and reported at the present term.

Decree affirmed.

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GALT vs. DIBRELL *et al.*

Where a deed of trust, by which slaves were conveyed, described them thus: "nine slaves in the possession of A, and six in the possession of B," it was held that the slaves were described with sufficient certainty.

The law of the place where a contract is made governs its construction, and where certain formalities are indispensable to its validity at the place where it is executed, the want of these renders it invalid every where, provided they affect the merits of the contract.

By the law of Virginia, a deed or bill of sale, if not proved and registered is void as to creditors and purchasers, but it is good between the parties, and in a suit in another State, the registration in Virginia need not be proven, unless the controversy be with some one protected by the law requiring it to be registered.

Where the maker of a deed of trust of slaves resided in Tennessee, (the slaves being then in Virginia,) and the slaves were afterwards removed to Tennessee, they became subject to the laws of Tennessee, and if the deed is not recorded in Virginia, it is necessary as to creditors, to register it in Tennessee according to her laws.

A narrative or statement of the clerk of a court in another State, endorsed on the back of a deed, that it was proved in open court by the subscribing witnesses, is not sufficient, (under the act of 1809, c 104, § 1,) to authorize its registration in this State.

Where a deed is proved in a court of record in another State, the only proof of the fact which will authorize it to be registered in this State, under the provisions of the act of 1809, c 104, is a copy of the probate from the records, properly certified by the clerk and presiding judge, &c.

Where a deed has been properly proved, by the provisions of the act of 1809, it must be admitted to registration in a court of record of this State, otherwise the registration is of no validity.

A debtor may by deed of trust prefer one creditor to another, yet he cannot thereby contract for his own benefit, and secure to himself the use and enjoyment of the property, if he does so the transaction is fraudulent and void as to other creditors.

A stipulation in a deed of trust, reserving to the debtor the right of receiving the rents and profits of the lands, the hire of the slaves, and to have the superintendence and management of the merchandise, to the same extent as if the deed were not made, is totally inconsistent with the rights of other creditors and renders the deed fraudulent and void as to them.

A deed void as to creditors, is nevertheless good between the parties.

A deed of trust was executed by A to secure certain debts, but contained stipulations which would render it void as to creditors, but there were no creditors of A at the time. A afterwards sold to B all his interest in the property conveyed by the deed of trust but subject to the debts specified in it. The deed of trust was duly proved and registered. A afterwards contracted debts, and judgments were obtained against him: Held, that the sale to B was not void as to such creditors, and that the property was subject to the debts specified in the deed of trust.

A power of attorney transcribed in the record, but not embodied in a bill of exceptions, constitutes no part of the record. NASHVILLE,
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Where the record of a judgment states that A produced a power of attorney to confess judgment for B & c, this is sufficient without setting out the power of attorney.

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Where a maker of a deed of trust sells his interest in the property conveyed to A, subject however to the debts specified in the trust, and a judgment is obtained against A and his interest sold at execution sale, the purchaser, (if indeed it is an interest which can be sold by execution at law,) can only be substituted to the rights of A, and he will hold the property upon the same conditions and subject to the same trusts that it was subject to in A's hands.

Where property is conveyed to trustees to secure debts due to certain creditors, without their knowledge, they may affirm the trust when it comes to their knowledge, and it cannot be revoked by the debtor after such affirmation.

Where a trust is created to secure the payment of debts which is not attempted to be enforced for ten years, this is not such laches as will discharge the trust as to creditors.

The facts of this case are stated in the opinion of the court.

J. Campbell and W. E. Anderson for complainant.

R. J. Meigs and J. Rucks for defendant.

TURLEY J. delivered the opinion of the court.

Randolph Ross, a citizen of White county in the State of Tennessee, being indebted to William Galt of the city of Richmond and State of Virginia, in the sum of \$3457, by bond bearing date the 3d day of July, 1816, and due on the 3d day of July, 1817, and to the Bank of Virginia, in the sum of \$15,000, due on the 12th day of August, 1820, did, for the purpose of securing said debts, on the 12th day of August, execute a deed of trust to William Dandrige and William Nickervis, of the city of Richmond and State of Virginia, by which he conveyed in trust for the benefit of the said Wm. Galt and the Bank of Virginia, divers tracts of land in the counties of Warren and White, State of Tennessee; fifteen negroes, the names of which not being recollected were described as being nine of them in the possession of Reuben Ross, and the remaining six in the possession of Wm. Ross, Sen., and also the stock in trade in two stores in the State of Tennessee, and one in the State of Virginia. By the provisions of said deed of trust, if Randolph Ross should fail to

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pay to Wm. Galt the amount of his debt on or before the 1st day of January 1822, and to the Bank of Virginia the amount of its debt in three annual payments of \$5000 each; to wit. on the 20th day of January, 1822, 1823 and 1824, the trustees were authorised, after giving eight weeks previous notice thereof, in some newspaper printed in the city of Richmond, to expose to public sale such of the trust property as they might think proper, and to apply the proceeds thereof, first to the payment of the expenses attending the execution of the trust, secondly to the debt of Wm. Galt, and thirdly to that of the Bank of Virginia. And by the further provisions of said deed of trust, it was stipulated that until the time might arise when it should become necessary to sell in order to execute the trust, Randolph Ross should be permitted to possess the lands and premises so conveyed, to receive the rents and profits thereof to his own use, also the hire and profits of the slaves, and to have the supreme control and management of the stores and merchandise to the same extent as he might have done, if the deed of trust had never been made.

At the time this deed of trust was executed, Reuben Ross and Wm. Ross, Sen., in whose possession the slaves were, were resident citizens of the State of Virginia. The deed of trust was never registered in the State of Virginia, but upon it the probate and certificate are endorsed, "Virginia, to wit, at a court of hustings held for the city of Richmond at city hall the 20th day of June, 1821. This indenture in open court was proved as to Randolph Ross, Wm. Dandrige, Wm. Nickervis and Wm. Galt, parties thereto, by the oaths of Anthony Robinson Jr., Samuel Lemorne and Anthony Robinson, witnesses to the same, which was ordered to be registered. In testimony whereof, I, Thomas C. Howard, clerk of the said court of hustings, hereunto set my hand and affixed the seal of the said court on the 20th day of June, 1821.

THOMAS C. HOWARD."

"Virginia, city of Richmond, to wit:—I, John Adams, mayor of the said city of Richmond and presiding magistrate of the court of hustings thereof, do hereby certify that Thomas C. Howard above named, is clerk of the said court, elected and qualified according to law, and that his certificate is in

due form. Given under my hand this 21st day of June, 1831. **NASHVILLE,**
JOHN ADAMS." **December, 1836.**

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"Virginia, to wit:—I, Thomas Man Randolph, Governor of the State of Virginia, do hereby certify and make known unto all persons to whom these presents shall or may come, that John Adams, whose name is signed to the annexed document, was at the time of subscribing the same and now is, mayor of the city of Richmond and presiding magistrate of the hustings's court thereof, in the State of Virginia, duly appointed and qualified according to law, and that to all his official acts as such full faith and credit ought to be given. Given under the great seal of the State, 21st June 1821.

THOMAS MAN RANDOLPH.

State of Tennessee, White county:—I, Turner Lane, register of the county of White aforesaid, do hereby certify that the foregoing deed of trust between Randolph Ross of the one part, and Wm. Dandrige and Wm. Nickervis and others of the second part, together with the sundry testimonials thereto annexed, was this 8th day of August, 1821, registered in the register's office of said county, in book G, and pages 90 and 100." Then there follows a like certificate of registration in the county of Warren.

About the 2d day of July, 1821, Reuben Ross having removed from the State of Virginia, arrived at Sparta and settled himself in the county of White, having with him the nine negroes described in the deed of trust as being in his possession in Virginia. On the 14th day of June, 1820, Anthony Dibrell, one of the defendants, became security for Randolph Ross to the branch of the Nashville Bank at Winchester, for the sum of \$750. On the 28th day of August, 1821, Randolph Ross conveyed to Reuben Ross twenty-one tracts of land subject to the deed of trust in favor of Galt and the Bank of Virginia. On the 29th day of August, 1821, he executed a deed of trust to Turner Lane and George Dawson for certain lands in the counties of Warren and White, to secure the payment of several debts therein specified, and among others that for which Anthony Dibrell was his security to the bank at Winchester, and on the same day he conveyed to Reuben Ross, eighteen other tracts of land, subject to the trusts cre-

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ated in the deed to Dawson and Lane, and the negroes in dispute, subject to the trust in favor of Galt and the Bank of Virginia. The bill of sale conveys the negroes by name, and upon it are the following endorsements of probate and registration:

“State of Tennessee, White county—I, Anthony Dibrell, clerk of the White circuit court, do hereby certify that the acknowledgment of the within bill of sale from Randolph Ross to Reuben Ross, for the within named ten negroes, was duly acknowledged in open court and ordered to be certified. Let it be registered. ANTHONY DIBRELL, Clk.”

“Registered and examined this 8th August, A. D. 1822.
TURNER LANE, Regr.”

“State of Tennessee, White county,—I, Turner Lane, register of White county, do hereby certify, that the foregoing is a true and perfect copy of a bill of sale from Randolph Ross to Reuben Ross, with the probate thereto registered in my office in book G, and page 91, the 8th day of August A. D. 1822. TURNER LANE, Regr.”

In addition to taking the property specified in these different conveyances subject to the trusts therein stated, Reuben Ross, as a further consideration for their execution, did on the said 29th day of August, 1821, execute to Randolph Ross his bond, by which he bound himself to pay the sum of twenty thousand dollars, to be discharged in annual instalments of two thousand dollars each, to be appropriated in the first instance to the payment of the debts specified in the deed of trust of the 29th day of August, 1821, to Turner Lane and George Dawson. In pursuance of this agreement, Reuben Ross became bound, together with Randolph Ross and Anthony Dibrell for the payment of the debt of \$750. Afterwards, for the purpose of raising money to pay this debt to the Nashville Bank, Reuben Ross, executed his note for the amount and interest thereon, with Anthony Dibrell, and Randolph Ross as his securities, payable at the Bank of the State of Tennessee at Nashville.

On the 26th day of January, 1828, this note thus executed by Reuben Ross, was renewed at six months for the last time in the joint names of Reuben Ross, Randolph Ross, Jacob

A. Lane, Anthony Dibrell, Jesse Lincoln, Elijah Drake and Thomas Ely, for \$785, at which time a power of attorney was executed authorising the president of the bank to confess a judgment at the maturity of the note, if it were not paid.

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In May, 1828, Reuben Ross departed this life. On the 1st day of August, 1829, Joseph Phillips, as president of the Bank of the State of Tennessee, confessed a judgment in the county court of Davidson on the note last mentioned, against all the obligors except Reuben Ross, for the sum of \$832 10, and costs. On the 24th day of October, 1829, Randolph Ross, Jacob A. Lane, Anthony Dibrell, Jesse Lincoln, Elijah Drake and Thomas Ely, moved the county court of Davidson for a judgment against John Paine and John Cain, administrators of Reuben Ross, as his securities to the note on which judgment had been rendered against them by the confession of the president of the bank, and obtained the same for the sum of \$835 35, and costs. The negroes in dispute were sold under the process issued on each of these judgments, and were purchased by the defendant Anthony Dibrell, on the 12th day of February, 1830, for the sum of one thousand dollars. On the 22d day of June, 1832, the executors of William Galt filed this bill of complaint against the defendants asking that the negroes and land mentioned in the deed of trust of August 12th, 1820, be sold for the payment of their testator's debt.

The first question for consideration is, as to the validity of the deed of trust executed by Randolph Ross to Wm. Dandridge and Wm. Nickervis, on the 12th August, 1820. It is argued by counsel for the defendants, that it is void as to creditors for several reasons. 1st. For uncertainty in the description of the negroes, they being described not by name, but by number and place of residence, to wit, nine in the possession of Reuben Ross, and six in the possession of Wm. Ross. This description is given we think, with sufficient certainty. The maxim of law that "*id certum est quod certum reddi potest*," applies with its fullest force to this question. The whole number of negroes in the possession of Reuben Ross and Wm. Ross are sold. Upon application to them no difficulty

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can arise as to their identity. It would have been different, had only a portion of them been sold, as it would then have been impossible without further description to identify them. The case in 11 John. Rep. 405, and the positions assumed in Shepherd's Touchstone, 249, amply sustain this view of the question.

2d. Because it was not registered in the State of Virginia, the place where the deed was executed, and where the trustees, *cestui que trust*, and the negroes resided. By an act of the Legislature of the State of Virginia, passed in the year 1819, c 99, it is provided, that deeds of trust and mortgages shall be void as to all creditors till such time as they shall be proven and acknowledged and delivered to the clerk of the proper court to be recorded. That the provisions of the statute of the State of Virginia have not been complied with is not denied, and it follows as a matter of course, that had the property remained in that State, no creditor's right could have been affected by this deed of trust. But in answer to this objection it is said, that in a short time subsequent to the execution of the deed of trust, the property was removed to the State of Tennessee, White county, and that the deed was legally proved in the State of Virginia, and registered in said county of White and State of Tennessee, within the time prescribed by law, and that therefore it conveyed to the trustees a good and sufficient title as against all creditors whatsoever. At the time this deed of trust was executed, Randolph Ross was a citizen of the State of Tennessee. By both the laws of Virginia and Tennessee, a deed of trust for personal property is valid as between the parties and their heirs without registration; then at the time the negroes were removed from the State of Virginia to the State of Tennessee, there was in existence a deed good as between the parties, which at any time might have been made good in the State of Virginia, as to all but precedent creditors, by being acknowledged or proven and delivered to the clerk of the proper court for registration, and in the State of Tennessee against all creditors by being legally proven or acknowledged and registered in the time required by our law, which is twelve months. For though we recognise as sound law the proposition which asserts that

all the formalities which are by the laws of foreign countries made indispensable to the validity of contracts there entered into, must be duly proven in every foreign tribunal in which they are in litigation, before any right can be founded on them.

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Yet we hold them to be such formalities as affect the merits of the contract, and the absence of which vitiates it. In illustration of which may be mentioned cases in which deeds cannot be read in evidence, unless duly proven and registered; cases where by a statute of frauds and perjuries, the contract must be in writing and the consideration stated, and cases in which instruments cannot be read unless properly stamped. But where the formality required is of such a character as does not vitiate the contract as between the parties, but is merely intended for the protection of third persons, then it need not be proven, unless it be in a controversy with a person intended to be protected thereby; to illustrate which may be mentioned the case now under consideration. A deed of trust is executed in Virginia for negroes at the time in that State; by her laws the deed is good between the parties, but void as to creditors, unless duly proven or acknowledged and filed for registration in the proper county. In a controversy arising out of this deed of conveyance in another State, the registration in the State of Virginia need not be proven, unless the controversy be with some one protected by the law requiring its registration. From this reasoning it follows, that as there is no controversy here with any person intended to be protected by the statute of Virginia, the want of registration in Virginia does not vitiate this deed of trust, and that there is no necessity to prove that it was there registered. But as the vendor resided in the State of Tennessee, and as the property was permitted to be removed thereto, it became subject to the laws of Tennessee, and the deed of trust not having been recorded in Virginia, it became necessary to record it in Tennessee according to her laws, and this we think might be well done, for no one will deny that if the deed of trust had been executed with a view to the removal of the negroes to Tennessee, the domicil of the vendor, that a registration in the State of Tennessee would have been good to pass the title as against creditors, or in other words, that the deed of trust

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in Tennessee would have been sufficient. Why then not register the first?

We have seen as between the parties it was good. The removal of the property from Virginia had freed it from the claims of all but judgment creditors, and those claiming under the deed of trust; there were so far as we can see, no creditors in the State of Tennessee, in fact no one claiming an interest in the property, except Randolph Ross and the trustees of the deed for the benefit of the *cestui qui trust*. As our law avoids all secret trusts in favor of creditors, it was indispensably necessary that the deed should be registered in order to preserve the rights of the parties thereto. This brings us to the consideration of the question as to whether this has been done, to determine which, we must examine whether it has been proven and admitted to registration according to the provisions of our statutes. In this case the bargainor was a resident citizen of this State, and the subscribing witnesses to the deed were citizens of Virginia. After a careful examination of all of our statutes of registration, we are of opinion that the act of 1809, c 104, § 1, is the only one that is applicable to this case. This statute provides, that where subscribing witnesses to any deed of conveyance, power of attorney, bill of sale, or bond for the conveyance of real estate, which may require registration, shall reside without the limits of this State, it may be lawful for the holders of such instruments to procure the testimony of the subscribing witnesses, to be entered on record in any court of record having cognizance thereof, and such probate endorsed on such instruments and authenticated according to the act of Congress, shall be admitted to registration in any court of record in this State. Have the provisions of this act been complied with? We are of the opinion they have not. We have no evidence that the testimony of the subscribing witnesses has been entered on record in any court of record in the State of Virginia. The narrative of the clerk endorsed on the back of the deed is not sufficient. The only proof of the fact which we can receive, is a copy of the probate from the records, properly certified by the

clerk and presiding judge or justice of the court. But if the probate were sufficiently authenticated, has it been registered as the law requires? Surely not. It has not been admitted to registration in any court of record in this State, as the statute requires, but the registers of White and Warren counties of their own accord, have spread it upon the registers books of those counties. This is no registration as this court determined in the case of *Den vs. Clay*, at Jackson in April last, 9 Yer. Rep. 257.

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3d. It is contended that this deed of trust is fraudulent upon its face as to creditors. After the decision we have made upon the question of registration, it is not perhaps very important minutely to examine this proposition. We consider the law well settled, that although a debtor may prefer a creditor by deed of trust, yet he cannot thereby contract for his own benefit. He may give up his property honestly to pay his debt, but he cannot secure to himself its use and enjoyment, and if he do so, the transaction is fraudulent as against his other creditors. We think there is sufficient upon the face of this deed of trust for the law to pronounce it fraudulent. The reservation of the right to receive the rents and profits of the land, the hire of the negroes, and to have the superintendence and management of the stores and merchandise to the same extent as if the deed had not been made, is totally inconsistent with the rights of other creditors and of necessity vitiates it. It is however proper to observe, this is fraud in law and not in fact; for we are fully satisfied that these debts intended to be secured, were justly due, and that nothing more was intended than an honest design to secure them.

In reply to these objections, it is urged by the counsel for the complainant, that granting it to be true that the deed has not been registered, that it is void as to creditors, yet on the 29th day of August, 1821, Randolph Ross, by bill of sale conveyed the negroes in dispute to Reuben Ross, subject by express contract to the different trusts specified in the deed of August 12th, 1820, which has been duly proven and registered and is not fraudulent as to creditors. This bill of sale was duly proven on 13th April, 1822, at the White circuit court, and duly registered by the register of said county on

NASHVILLE, the 8th day of August, 1822. The only question then for consideration is as to its effect. We have seen that as between

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Randolph Ross and the trustees of the deed of August 12th, 1820, the legal right to the negroes in dispute was transferred by the deed; but not so as to creditors. If the deed be good as between the parties but bad as to creditors, still the transaction is valid to all intents and purposes, until there be creditors whose rights are to be affected by it, and if there should never be any, the transaction can never be called in question.

On the 29th day of August, 1821, when the bill of sale from Randolph Ross to Reuben Ross for the negroes was executed, there were, so far as this court can legally judge, no creditors of Randolph Ross in the State of Tennessee to be affected by the deed of trust of 12th of August, 1820, for it cannot surely be necessary to argue, to prove that the law recognises none as such, unless they be judgment creditors, and the defendants do not pretend that they were. Then at the date of this bill of sale, Wm. Dandridge and Wm. Nickervis, the trustees to the deed of trust, were the legal owners of the negroes, subject to the trust specified in the deed, and Randolph Ross the equitable owner. What did Reuben Ross buy? All the right and title which belonged to Randolph Ross, subject to the debts provided for in the deed of trust, then at that particular moment of time, to wit, so soon as the bill of sale was signed, sealed and delivered, Randolph Ross ceased to have any further interest in the property. He became totally disconnected from it, as much so as if he never had any interest in it, and having no creditors at the time who could claim under the law to be injured by the transaction, the property was forever discharged from all his liabilities, and Reuben Ross by contract being substituted in his stead, held the property in trust for Dandridge and Nickervis. In this situation the property remained until the judgment of the 1st. August, 1829, was recovered by the Bank of the State against Randolph Ross, Anthony Dibrell and others, as security for R. Ross, and the judgment of the 24th of October, 1829, was obtained by Randolph Ross, Anthony Dibrell and others as securities against Reuben Ross' administrators, under which executions were issued and the negroes sold and bought by

Dibrell. These judgments it is argued are void, and therefore no right can be acquired under them. We do not think so. It is true that they are summary proceedings, obtained on motion and without notice, and therefore the judgment of the court must specify with sufficient certainty all the facts necessary to give jurisdiction. This we think is done. The judgment in favor of the bank states that Joseph Phillips, the president of said bank, came into open court and produced a power of attorney from the defendants authorising and empowering him to confess the judgment. This shows sufficient authority.

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But it is said that the record shows that the power of attorney was executed to Leonard P. Cheatham. The power of attorney legally forms no part of the record, unless it be exhibited in a bill of exceptions, which is not the case here. The clerk had no right to copy it, and it cannot be received to contradict the judgment of the court, which says that Joseph Phillips did produce a power of attorney authorising him to confess the judgment. How can we say in the absence of a bill of exceptions, that there may not have been two powers of attorney, the one to Phillips and the other to Cheatham. This is the only point on which this judgment is attacked, and having sustained it, we sustain the other as matter of course, because they are so intimately connected that they must stand or fall together, the one being the foundation of the other.

The next question is, what did Anthony Dibrell purchase under these judgments. The execution in favor of the bank conveys him no title, because we have seen that Randolph Ross had long before that period parted from all right that he had to the negroes, and because Reuben Ross, even if he had such right as could be sold by the execution, was no party to the judgment and therefore his rights could not be affected by it. It only remains then to enquire what interest he acquired by his purchase under the execution on the judgment against the administrators of Reuben Ross. We have seen that as between Reuben Ross and the trustees to the deed of trust of the 12th August, 1820, Reuben Ross held the negroes subject to the trusts. Is there any thing arising out of his rela-

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tions with the persons who obtained the judgment as his securities against his administrators which changes that relation? We think not. He never held the property as his own absolutely. His bill of sale recognises the debts due to Galt and the Bank of Virginia and makes them an express charge upon the property; it is proven and recorded in the proper county and in the right time. No body can have been deceived in supposing the property liable for his debts before the trust debts were discharged, and therefore there is no pretence for saying that it is fraudulent against his creditors. Supposing then that Reuben Ross had an interest in the negroes in question, which was subject to execution for his debts, (a question not necessary to be determined and which we do not determine,) what was it? Surely an interest subject to the trust specified in his bill of sale. So that Anthony Dibrell the defendant can only claim to have been substituted by his sale and purchase on this judgment in his place, and to hold the negroes subject to the same trusts.

But in answer to this it is said, that the sale of the negroes subject to the trust debts from Randolph Ross to Reuben Ross, was a trust created for the benefit of Galt and the Bank of Virginia without their knowledge, which might be changed, altered or destroyed at any time before they received information thereof and assented thereto, and the case of *Acton vs. Woodgate*, 8 Condensed Eng. Ch. Rep. 97, is quoted as authority for this proposition. This case determines that if a debtor conveys property in trust for the benefit of his creditors, to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees and is revocable by the debtor, but unquestionably the revocation must be made before the creditors have received information and affirmed the trust. See Kent's Com. 301-2: 1 John. Cases, 205: 12 John. Rep. 281: 2 P. Wm's. 427: 1 John. Ch. Rep. 129. In this case it is admitted that Randolph Ross could not of himself revoke the trust, because Reuben Ross was a purchaser for a valuable consideration, and had paid a large amount, though not all of the purchase money. There is no pretence that Reuben Ross agreed to a revocation of the trust

before his death, and no satisfactory evidence that his administrators did after his death. It is true, that Randolph Ross took possession of the property after Reuben Ross' death, but without any kind of authority. We are therefore of opinion that the trust has not been revoked, and that the filing of this bill, if it were necessary that such proof of the affirmation should be had, has fixed the rights of the parties. This train of argument establishes the position, that Galt has a lien upon the negroes for the payment of his debt which is valid in law, and binding upon all persons, either creditors or subsequent purchasers.

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Has he lost his lien by laches in neglecting to enforce it from the 1st day of January, 1822, the time the trustees to the first deed had the right to sell upon the non-performance of the conditions in the deed of trust, up to the 22d day of June, 1832, the time this bill was filed, a period of little upwards of ten years.

We know of no principle upon which it can be so determined. No man is bound to pursue his debtor except to avoid the operation of the statute of limitations, or presumption of payment arising from lapse of time. This is an express trust, and no facts are proven to cause the statute of limitations to run, and ten years is too short a time, by any authority, to raise a presumption of payment; besides the indulgence in this case was given at the earnest and repeated solicitations of Randolph Ross, and upon promises to pay made again and again, which rebuts any idea of fraudulent indulgence; and if a creditor have a legal lien upon his debtor's estate which is good and available against other creditors, they have no right to complain that he does not enforce it, unless they think the property may sell for more than his debt, in which case they may hasten him by bill in chancery. This has not been done. We are therefore of opinion that the complainant's right to the relief sought is perfect, and affirm the decree of the chancellor.

Decree affirmed.

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Jones
v
Ward

JONES, *et. al.* vs. WARD.

The bill charged that the testator shortly before his death loaned the defendant \$300. The answer denied all recollection of the fact: the proof of one witness was that the amount was loaned, but it appeared that a settlement of accounts had taken place between the testator shortly before his death and a receipt in full executed: *Held*, that if the loan were made before the settlement it was embraced in it, if afterwards the evidence should show the fact to be so, and as the proof did not show whether the loan was before or after the settlement, it could not be charged to defendant.

A testator by his will created his executor a testamentary guardian for his children, and directed the property to be kept together for the benefit of his family, &c. One of his children, whilst at school, incurred by his extravagance a large debt, which the executor and guardian to save him from disgrace, and to preserve the elevated standing and character of the family paid, and claimed its allowance in his general account of disbursements for the family: *Held*, that such payment was unauthorised, and that the executor was chargeable with the amount.

An executor is liable to pay interest upon money due by him to the estate, where he has been guilty of such acts of negligence or wrong administration as will disappoint the claimants, or the assets.

If an executor apply the assets in payment of a claim which he is not authorised to pay, although the payment was made *bona fide*, he must account for the principal sum with interest.

Courts of equity have a discretion to allow interest or not against executors, according to the circumstances of each case, but this is a legal discretion, governed and controlled by principles which ought not be departed from.

Where the same individual is both executor and testamentary guardian, and before the two years limited for settling estates has expired, he pays a sum in his own wrong: *Held*, that the sum paid was never in his hands as guardian, and he ought only to be charged with the principal sum and simple interest from the time he paid it.

A and B were joint executors of C. B received large sums in Virginia, due to the estate of C. These sums were paid by his co-executor to C's distributees. There were also individual accounts relating to individual transactions existing between the executors. A settlement of accounts took place between them, after the payment above, and a receipt under seal of all demands of every kind and description, &c. was executed by A; *Held*, that this receipt *prima facie* embraced the amount paid by A, to the estate of C.

The current of modern decisions is, that a receipt whether under seal or not, may be explained by parol evidence.

Parol evidence to explain a receipt, or to show that an item, *prima facie*, embraced within it, was really not included, should be clear, strong and irrefragible.

Where the general language of a receipt clearly comprehends an item of account existing between the parties at the time the receipt was given, the answer of the defendant, filed more than twenty years after the execution of the receipt, stating that the item was not embraced in it, accompanied by general testimony, that in the opinion of

the witnesses the party to whom the receipt was given, was not at that time able to **NASHVILLE,** satisfy the item, &c. is not sufficient to overthrow the legal effect of the receipt, or to **December, 1836.** exclude said item from its operation.

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A contingent general legacy will not bear interest until the contingency on which it is to vest occurs; but where a legacy is specific, and only the time of its enjoyment postponed, it bears interest from the testator's death.

Guardianship regularly ceases when the ward attains full age, or in case of a female ward, upon marriage under age.

It is the duty of a guardian to rent his ward's land. When it has been been rented he will be charged with the amount he received, and when not rented out he must, in cases where it could have been rented, be charged with its estimated value.

Guardians, under our statutes, are charged with compound interest.*

Where payments have been made, interest must be calculated on the principal up to the time of payment, the amount paid deducted, and the balance charged as principal, &c.†

Alexander M. Clayton, Esq. was commissioned by the Governor, as a special judge, to try this cause, one of the members of the regular court being constitutionally ineligible to sit in it. All the facts are stated in the opinion delivered by Judge Clayton.

R. J. Meigs and J. Rucks, for complainants.

F. B. Fogg and Geo. S. Yerger, for defendant.

CLAYTON, Special Judge, delivered the opinion of the court.

The bill in this cause was filed by the legatees of Peter Jones, deceased, against E. Ward, the executor, praying for an account and for a decree against the executor for such sum as may be found due to them. The account was ordered and was taken in the court below, exceptions were filed to it by both complainants and defendant, a decree was rendered for the complainants for a large sum, an appeal was taken to this court, and we have now to decide upon the correctness of

* Modified by the act of 1831, c. 30.

† There were other exceptions taken to the report, and passed upon by the court, but as they decide no principle, but were merely matters of fact, they have not been noticed.

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that decree, upon the exceptions filed to the report of the clerk and master. The record is voluminous and the questions growing out of it, although involving few important principles, are yet numerous and intricate. They relate to a long series of transactions, running through many years, and comprehending many particulars, incapable from their very nature of being generalised and reduced to system. Our opinion will, therefore, have to be given without much regard to the order in which the questions arise.

The first question which will be considered relates to an item of \$300, alledged to have been lent by the testator, Peter Jones, to the defendant, a few days before the death of the former. The answer denies all recollection that any such loan was made, the evidence in support of the claim is the deposition of Mrs. Watkins, the widow of the testator. A short time before the death of the testator, a settlement was made between him and the defendant Ward, upon which Ward executed his bond for the balance found due from him, and the testator gave a receipt in full up to that time. Whether the testimony of Mrs. Watkins relates to a time prior or subsequent to this settlement does not very distinctly appear. If the loan were made before the settlement, it was embraced in it, if afterwards, the evidence should show the fact to be so. The answer is responsive to the bill, it contains as distinct a denial as should be required after the lapse of such a length of time, and we do not think it is so outweighed by the testimony as to authorise us to allow the claim; neither is there any reason to charge the executor with this sum, because of his failure to reduce it into his possession as assets. There is no evidence that he knew of its existence, either in the hands of the widow, or any other person, and in the absence of such testimony he cannot be charged with a *devastavit*. This exception is overruled.

The next exception which will be considered, is one on the part of the defendant, because of the rejection of an item of \$714, which was paid by the executor, for the improvident expenditures of Alex. Jones, one of the legatees, whilst at college. It is claimed by the executor in his general account of disbursements, and he contends that the payment was au-

thorised by the enlarged powers conferred on him by the will. It was paid from a conviction that it was best for the young man; it was done to save him from disgrace, and to preserve the elevated standing and character of the family. These feelings reflect credit on the man who could entertain and act upon them, but they cannot have weight in the determination of the cause. The question is purely legal, and must be decided by the law. We think the payment by the executor was unauthorised, and that he is chargeable with the amount to the estate. 1 Roper on Leg. 589.

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The question of interest upon this sum is one of more complexity. It is insisted for the defendant that an executor is only to be charged with interest when he has received interest, or when he has used the money of the estate for himself. The rule thus laid down is too restricted. The language of this court in *Turney vs. Williams*, 7 Yer. 213, does not justify the conclusion, that an executor or administrator is only chargeable with interest in the cases there enumerated. In that case the court says, "Where an executor uses the money of the estate for himself; where he keeps the money by him without a reasonable ground for doing so; where by long delay in settling his accounts, the use of the money by him may be inferred, in all such cases interest will be charged. In specifying these instances the court nowhere intimates an intention to exclude others. The rule will be found to have been laid down with more latitude than is contended for in the argument. In *Williams on executors*, vol. 2, p. 1131, it is said, "there are two grounds on which an executor or administrator may be charged with interest. 1st. Negligence in laying out the money for the estate. 2nd. That he has himself made use of the money to his own profit or advantage, or has committed some other misfeasance." When we examine what the acts of misfeasance are, which will thus render an executor or administrator liable for interest, we find that they are all such acts of negligence or wrong administration as will disappoint the claimants on the assets. *Ib.* 1105; as if he applies the assets in payment of a claim, which he is not bound to satisfy. *Ib.* 1109. In these cases he is bound to account for the principal sum with interest.

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A single case only is referred to in argument, in which no interest was charged. *Brunton vs. Pemberton*, 12 Ves. 386. That was a case in which the executor set up a claim to the fund, believing he was entitled to it in his own right. The court was of opinion, that he would have been clearly entitled to it if he had set up his claim in the life time of the testator, but as he lost the principal sum, because of his negligence in asserting his right, they would not impose on him the further loss of the interest. Other cases of a similar character are to be found, but they stand so much on their own peculiar circumstances, that no general rule can be deduced from them. *Massey vs. Banner*, 4 Mad. 219: *Byrchell vs. Bradford*, 6 Mad. Rep. Courts of equity have retained a discretion to allow interest or not according to the circumstances of each case, yet it is not an arbitrary, but in a great degree a regulated discretion, controlled and governed by principles from which we cannot depart without introducing uncertainty and confusion into our system of equitable jurisprudence. The executor must be charged with interest on the amount from the time when he paid it out. But this sum was paid by him before the expiration of two years from the time he became executor, it was never in his hands as guardian, and he is only to be charged with the principal sum and simple interest from the time he paid it out.

We proceed next to "the exception of the defendant to the refusal of the clerk and master to give him credit for certain sums of money, amounting to nearly \$1000, claimed to have been retained by the executor to satisfy the same amount due to him as the executor of Richard Jones deceased. Peter Jones and Edward Ward became the joint executors of Richard Jones, about the years 1803 or 1804. There is evidence in the record to show, that Peter Jones frequently received considerable sums of money, belonging to the estate of Richard Jones, and much testimony has been taken to show that he could not have paid it to the legatees, or to the co-executor. A settlement was made by Col. Ward, one of the executors, with the estate of Richard Jones in 1810, and the estate is then found to be in his debt upwards of \$600. Peter Jones never made any settlement of his trans-

actions as executors of said estate, so far as appears from this record, unless the settlement made by Ward, included the transactions of both executors. That the settlement of Ward did include the transactions of both executors to some extent, is manifest, because we find in the account exhibited by him that the estate is charged with the expenses of Peter Jones in making two trips to Virginia, and with a small sum of money paid by Peter Jones. It is not shown in evidence, nor is it contended in argument, that Col. Ward paid the legatees of Richard Jones, deceased, the amount of money said to have been received by Peter Jones, at any time after the settlement, which he made in 1810; if Col. Ward ever paid it, it was before that settlement. If he did pay money for Peter Jones to the legatees of Richard Jones, at any time before the death of Peter Jones, it became a debt due from Peter Jones to the defendant, as an individual, without any reference to their fiduciary character. It was a debt due from one to the other, without any regard to its origin. In February, 1811, a few days before the death of Peter Jones, a settlement took place between him and the defendant Ward. It was made at the house of Jones, in the prospect of his speedy dissolution, and from the unambiguous and comprehensive language used in the receipts which passed upon the occasion, it was probably intended to close for ever between the parties all accounts on this side of the grave. The instrument signed by Ward says, "this day had a final settlement with Peter Jones, of all and every transaction of every kind and description: except his crops of cotton made in the years 1809 and 10, which are in my gin house, and find myself indebted to him in the sum of \$150." Stronger and more expressive language could scarcely be employed. It is insisted in argument, that this receipt was intended to embrace only the individual dealings and accounts of Peter Jones and Col. Ward, and was not intended to extend to their transactions as the representatives of Richard Jones deceased. If this be so, still the decree below is correct. If Col. Ward had previously paid the debt of Peter Jones to the legatees of Richard Jones, it was then a debt due to himself. If he had not paid it at the time, there is no evidence that he

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has paid it since, and if it be a subsisting debt, it is due to the legatees of Richard Jones; the defendant Ward, after this lapse of time, is not liable for it, unless he has received it. It is insisted further, that although the receipt upon its face may be comprehensive enough to embrace the matter of this exception, yet the receipt may be explained by parol evidence, and the testimony plainly shows the amount here contended for was not included. It is perhaps unnecessary to go into the doctrine, as to the admissibility of parol testimony to explain written instruments. The cases upon the subject are very numerous, and not in entire accordance with each other. Yet the current of modern decisions is, that a receipt, whether under seal or not, may be explained by parol testimony; receipts are regarded as an exception to the general rule, and testimony to explain them is admitted without hesitation, whenever they come in question. *Tobey vs. Barber*, 5 John.: 12 John. 531: *Bowen vs. Bell*, 20 John. 9 Cow. 270: 17 Mass. 257: 1 Peters C. C. 182: 3 H. & McHenry, 433: 1 J. J. Marshall, 387: 7 Monroe, 293: 7 Dow. & Ryland, 141: 3 Bar. & Adolphus, 833. But it is required, that the proof thus introduced to explain a receipt should be clear, strong and irrefragible, 6 Ves. 322, &c. The evidence relied on in this case, is the answer of the defendant. In considering the answer, we shall allow it the same weight which would be given to the testimony of any third person entirely disinterested and entirely worthy of credit. The character of Col. Ward for veracity and virtue, stands in no need of support from us, and his conduct in relation to this estate has been that of an honest and conscientious man. His testimony is relied on to limit and restrict the effect of an instrument couched in the broadest and most comprehensive terms, and made under very peculiar circumstances. The parties had been intimate and confidential friends, they had numerous transactions running through several years. One was sinking gradually, yet certainly to the grave when the settlement was made; its object seems to have been to close their worldly concerns, and to preclude any future or farther investigation. After this adjustment, Mr. Jones made his will, appointed Col. Ward his executor, confided very

unusual and extensive powers to him, but no where lets fall an expression indicating a belief that the defendant had any claim against him. He died under the conviction, that his accounts with Col. Ward were closed. But it is now said, this settlement was not general, but partial, that it did not embrace every transaction, but only some particulars, that it was not final, but liable to be ripped up and reinvestigated.

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The cases require that a settlement thus solemnly made should be abridged in its effect and operation only by the clearest, the strongest, and most undoubted testimony. Is the testimony in this case of that character? The defendant in regard to another occurrence, which is charged to have transpired about the same time, says in his answer, "it has been a long time since; and respondent with sorrow admits he has a bad memory, and if the fact ever existed, he has not at this time any recollection of it." The receipt bears date more than twenty years before the answer was filed. Not a single reason is assigned why this demand was not included in the general settlement. The same necessity existed for settling this, which existed in regard to the other items; it was possibly the most important in amount among them and its omission cannot be accounted for. With all these circumstances in support of the receipt, we must regard it as final and conclusive between the parties at its date. We come to this conclusion without any doubt as to the defendant's belief of the truth and correctness of what he states, yet the lapse of time, the decay of his memory, and the danger of opening settled accounts, without the most full and convincing proof induce us to let the matter rest as the parties themselves placed it, more than a quarter of a century ago.

We pass next to the exception of the complainants, as to the amount paid to Henry T. Jones, by the executor, and allowed to him in the decree. We think this exception is not well taken. The construction of the will as to the bequest to Henry T. Jones is not free from doubt; the instructions given by the legatees, then of full age, to the defendant Ward are not perspicuous; the compromise as understood and acted upon by the executor was advantageous to the children of Peter Jones, and the payment was made in entire good

NASHVILLE, faith. A contingent general legacy will not bear interest until the contingency on which it is to rest occurs, yet a specific legacy is considered as severed from the bulk of the testator's property by the will, and interest is computed from the testator's death, although the time of enjoyment be postponed. 2 Rop. Leg. 188, 24. The hire of the negroes specifically bequeathed, properly belonged to H. T. Jones, and as he gave them up by the compromise, the other legatees are benefitted to that extent. The hire exceeds the interest of the general legacy, and we shall permit the credit allowed the executor to stand unaltered.

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We proceed next to an examination of the exceptions as to the rents. The account for rents commences in 1818. William Hart married Catharine, the daughter of Peter Jones, in 1816, and Alex. Jones became of age in 1817. It is sought in this case to charge the defendant with the rents for the reason, that he is the testamentary guardian of the children of Peter Jones, and to charge him not only with the rents actually received, but with the estimated value of the land when it was not rented out. Guardianship regularly ceases when the ward attains full age, or marries, if a female. The defendant therefore cannot be regarded as the guardian of these two persons, after the marriage of the one, and the majority of the other. He was not bound to rent out and to manage their portion of the land. He is chargeable to them for any rents he may have received, but is not chargeable for any estimated rents after the periods above named. Bradley purchased the interest of Alex. Jones in 1822, in his part of the land. Alex. Jones died in 1823, leaving an infant son. No administration has been taken on his estate. Bradley would be entitled to any rents accruing since his purchase; any which Col. Ward previously received belonging to Alex. Jones, may be paid to his infant son Algernon S. Jones, after deducting a note for \$146, with interest due from Alex. Jones to the defendant. Amelia married in 1828, and James C. Jones became of age in 1830, the same principle will govern in regard to their claims for rent, which was laid down in reference to the other two legatees. Until the division of the land took place in 1823, the defendant will be charged with rent annually from 1817.

on half the quantity of cleared lands, exclusive of the widow's dower, for Jas. C. Jones and Amelia. From that time he will be charged with the rent of the cleared land allotted to each. The sixteen acres proved to be worthless will not be included in the account. When the land was rented out, he will be charged with the amount received, when not rented, with its estimated value, as it might have been rented by him. We see no good reason to depart from the estimate fixed upon it in the account. When the defendant cultivated the land, it should be considered as rented by him. He should be allowed a credit of \$36 75 cents for repairs to the plantation in 1820. The exception to the amount allowed for bailing cotton should be sustained. The defendant should have credit for the value of the linen and rope furnished for bagging, in addition to the allowance for pressing the cotton. From this allowance the weight of the rope and bale should be deducted at the price for which the cotton sold. The exception, as to the horses, is also sustained; the proof shows them to have been worth \$80 each, and they should be credited at that price. The exception is also sustained to the striking off the interest from the account paid to Thomas Watson. The executor is held to account for interest on all sums received by him, and he should be allowed it on all sums paid out. The exceptions of the complainants, as to the allowance of the physicians bill for attendance on Claiborne, and the allowance to the defendant for attention to Dinah and Dick, and for the omission to charge hire for Claibore, in 1825, are all overruled. The hire of Peter and Washington, to which exceptions have been filed on both sides, will be permitted to remain unchanged. The exception of the defendant to the rejection of William Hart's note to him, offered as a credit to the executor in the account of Hart against him, is sustained. He is entitled to the credit. By consent of the counsel in argument, the exception, as to the note of Watkins, is sustained, and a credit for its amount allowed to the executor in the general account. A credit of \$60 should also be allowed him for his expenses in keeping Sylvia and her children, during the years 1825, 6, and 7, being \$20 a year.

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The only remaining question relates to the mode of computing interest on the account. In England, in early times, the claim to interest met with but little countenance in the courts, but it has been growing gradually into favor. The first cases on the subject laid down the rule, that an executor lent out money at his peril; he was liable if it was lost, and was entitled to retain the profit as a kind of premium for the risk. This rule was adhered to with some fluctuation till the time of Lord Thurlow, when the present rule was established. In cases of negligence in executors, four per cent. only is charged; where misfeasance mingles in the transaction, the rate is raised to five per cent. Trustees of every kind are uniformly treated with great indulgence. It is said in a work of reputation, published only a dozen years ago, that in the whole range of English decisions upon the various duties of executors, there is but a solitary case giving compound interest. Hoffman's Ch. Prac. 104. The courts in the United States have gone further, and have occasionally given it, yet it is usually done under peculiar circumstances.

In this case the defendant is chargeable, not only as executor, but as guardian. The will confers powers upon him, which he could only exercise in the character of guardian. Independently of any statutory provisions, we might not be inclined to charge him with more than simple interest, but our statute requires guardians to account annually for interest on all sums in their hands. This is equivalent to compounding it, and we are not at liberty to depart from the statute. The mode of computing interest is correctly laid down in *Jackson vs. The State of Connecticut*, 1 Joh. Ch. Rep. 17. The payment is first to be applied in discharge of the interest due, and the balance in discharge of the principal, or what amounts to the same thing, where the payment is equal to the interest or exceeds it, the interest is calculated on the principal sum up to the time of payment, the payment is then deducted from the amount, and the balance stands as principal.

The directions then which will be given in regard to the computation of interest are, that the account of the executor with the estate will be balanced at the end of two years

from the time he became executor. Upon the sum then found to be in his hands he will be charged with interest till the end of the year, the amount of his disbursements subsequent to the striking of the balance, will be deducted from this sum of principal and interest, and the balance will stand as the sum on which interest is to be calculated for the succeeding year. This principle will be pursued throughout the time he acted as guardian. Annual rests will be made, and the balance in hand, after deducting the disbursements of the defendant at the close of each year, will form the sum on which interest is to be calculated for the succeeding year. This method will be followed as long as the defendant acted as the guardian of the legatees.

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From the time he ceased to be guardian, either by the marriage or the majority of the legatee, he will be only charged with simple interest. The sum paid for Alexander Jones, mentioned in a former part of this opinion, will be excluded from that part of the account in which the defendant is charged with compound interest. It will stand alone at simple interest through the whole period.

The decree below will be modified and reversed, so far as it conflicts with this opinion; in all other respects it will be affirmed. The chancellor directed that each party should pay his own costs. We think this was right, and we direct that each party pay his own costs in this court and the court below.

Decree reversed.

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JACKSON *vs.* TIERNAN *et al.*

Under the act of 1787, c 22, § 1, where process is served on one *material defendant*, the court obtains jurisdiction over all others, no matter where resident, and may proceed to decree the matter in dispute, although the rights of the non resident defendants are wholly distinct from the parties before the court.

To constitute a "*material defendant*," within the meaning of the above rule, the party on whom the process has been served, must have an interest in the matter in controversy, or a right which is to be affected by the decree.

Where a person had transferred all his interest in the subject matter of the suit, or it had been attached at the suit of a creditor and sold, and no decree is sought against him, he is not such a "*material defendant*" as will give the court jurisdiction to decree against others, who are non-residents, and on whom process has not been executed.

To give jurisdiction to the chancery court, against non-residents, by virtue of the provisions of the act of 1787, c 22, the whole transaction, or cause of action, must have accrued in Tennessee.

An assignment of part of the proceeds of tobacco, which had been shipped to Baltimore, was made in Tennessee to A; one of the partners to whom the tobacco was shipped, was notified of the fact in Tennessee, notwithstanding which, the firm of which he was a member, attached the tobacco in Baltimore, sold it there, and applied the proceeds to their own use: It was held, that the "*transaction*" or cause of action accrued in Maryland, and that the court of chancery had no jurisdiction under the act of 1787, to make a decree in favor of A, without service of process upon the defendant.

The facts of the case are stated in the opinion of the court.

T. Washington and Geo. S. Yerger, for complainant.

W. E. Anderson, for defendant.

TURLEY, J., delivered the opinion of the court.

On the 21st day of May, 1819, Thomas H. Fletcher, a citizen of Davidson county, State of Tennessee, drew a bill of exchange in favor of James Jackson, the complainant, on the house of Luke Tiernan & Sons, of Baltimore, in the State of Maryland, for the sum of \$2,400, payable sixty days after sight. Previous to the drawing of this bill of exchange, Thomas H. Fletcher had shipped to Luke Tiernan & Sons sixty one hogsheads of tobacco from the port of New Orleans, out of the proceeds of which complainant was

informed the bill would be paid; and in order to avoid all danger of loss from the non-payment of said bill, Fletcher, the day after the bill was drawn, transferred upon the invoice of said shipment of tobacco to the complainant, an interest in so much of the proceeds as would be sufficient to secure him from loss. Shortly after the bill of exchange was drawn, complainant met with Charles Tiernan, one of the firm of Luke Tiernan & Sons, in Nashville, and informed him, that the bill had been drawn, and the assignment of an interest in the tobacco made on the invoice to secure its payment, and inquired of him if there was any danger of the tobacco being attached in Baltimore by Fletcher's creditors, and was told that there was not, and that the bill would be accepted and paid out of the proceeds of the consignment. Previous to this transaction Fletcher had been indebted to Luke Tiernan & Sons, but the debt had been arranged and paid by a transfer of a note on other persons. After the conversation with Charles Tiernan, however, this arrangement was changed, the notes transferred were redelivered to Fletcher, and the debt due by him to Tiernan & Sons restored to its original footing, for the payment of which the tobacco was on its arrival in Baltimore attached and sold. Tiernan & Sons refused to accept the bill of exchange, and it was protested for non-payment, and this bill is filed to subject the proceeds of the tobacco in their hands to its satisfaction.

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A copy of the bill and a subpoena were served on Thomas H. Fletcher, but returned *non est inventus*, as to Luke Tiernan & Sons. Fletcher answers and admits the facts as charged. Tiernan & Sons filed a plea in abatement, the substance of which is, that they are the only material parties to the suit, that they are non-residents and have not been served with process. And the question now is, has this court jurisdiction of this cause? It is contended that it has, because, 1st. Thomas H. Fletcher, who has been served with process is a material party to the suit, which gives the court jurisdiction of all other persons who are necessarily connected therewith, no matter where domiciled; and 2d, because the transaction on which the bill is filed, took place within the limits of the State of Tennessee, which by the provisions of

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and 14, gives the court jurisdiction in express terms. We will examine these propositions in the order in which they arise.

It is a well settled principle of chancery practice, that all persons materially interested in the subject of controversy, ought generally to be made parties to the suit, either plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice by settling the rights of all persons interested. This general rule, however, admits of many qualifications, one of which is, where a person who ought to be a party is out of the jurisdiction of the court, which fact being stated in the bill, and admitted by the defendants, or proved at the hearing, is in most cases a sufficient reason for not bringing him before the court, and the court will proceed without him against the other parties, as far as circumstances will permit; but if the absent party is to be active in the performance of the same, or if he have rights distinct from those of the other parties, and a decree is sought against him, the court cannot proceed to a determination against him, as where a conveyance by him is necessary, or where a mortgage is to be foreclosed against the original mortgagor or his representatives or assignees. Mit. Pleadings, 25, 133, and 134. Hence it has been well observed, there frequently arises an absolute defect of justice, which required the interposition of legislative enactment. By the principle as above stated, this court could not proceed to a determination against Luke Tiernan & Sons, though Thomas H. Fletcher were a party materially interested in the subject of the controversy, as their rights are wholly distinct from his, and the decree to be made effectual would have to be pursued against them. But this defect in chancery practice has been remedied by our act of 1787, c 22, § 1, which provides, that where any defendant or defendants against whom a subpoena shall issue, are non-residents, and shall fail to enter an appearance, the court may, upon affidavit of the fact, make an order for such defendants to appear by a certain time therein named, which order shall within sixty days after it is made, be published in some Gazette within the

state, for such length of time as the court may direct; and if the time specified for the appearance be permitted to elapse, the bill may, as to them, be taken *pro confesso*, and a decree made thereon as though they were present. Under this statute it has always been held, that where process can be served on one material party, the court can obtain jurisdiction of all others, no matter were resident, and may proceed to decree the things in dispute, although the rights of the non-resident defendants may be wholly distinct from those before the court. What constitutes a material defendant? An interest in the matter of controversy, a right which is to be effected by the decree. If one have no interest in the controversy, can be neither gainer or loser by its result, and no decree can be rendered either for or against him, he need not be made a party to the bill. In the case now under consideration, the bill is filed by the complainants, to subject a fund in the hands of Luke Tiernan & Sons, on which he alleges he has an equitable lien. What interest has Fletcher in this fund—and how are his rights to be effected by any decree which may be given in the case? At the time the lien was given, he was the legal owner of the property out of which the fund was created, and had he so continued he would have been a necessary party to the suit, as the possession of the consignees would have been his; but he does not so continue, for the property has been attached and sold by his creditors, and the proceeds thereof applied to the payment of his debts. By this proceeding his right to the property or fund arising out of it, is as completely gone as if it had never existed. Could he have maintained an action for the tobacco against the purchaser under the execution? Certainly not: he would have been met by the answer, your right has been transferred to me by law. Could he have maintained an action for the money realised by the sale of the tobacco against his creditors and consignees, L. Tiernan & Sons? Surely not. He would have been met by the answer, your money has been appropriated by law to the satisfaction of my demands against you. Then he has no interest in the fund which can be effected by a decree, and he can have no interest in having the money taken from one creditor and given

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to another, as he will still be indebted to the same amount, no matter to which of the contending parties it may be decreed. It is equally certain, that no decree can be rendered either for or against him in this case. For though the complainant has a claim against him, as the drawer of the dishonored bill of exchange, yet it is a legal demand, and cannot be enforced in equity, and this bill is filed to subject the fund, not to make him personally responsible; then it follows clearly, that he is not a material party to this suit, and that his having been made so, does not give this court jurisdiction of the persons of Luke Tiernan & Sons.

If Thomas H. Fletcher be not a material party, and the court through him cannot obtain jurisdiction of L. Tiernan & Sons, is there any thing else in the Statutes of 1787, c 22, § 1, and 1801, c 6, § 4 and 14, which gives to this court jurisdiction. The act of 1787, c 22, was obviously passed to remedy the rule before referred to, which prevented courts of chancery from giving decrees in the cases specified where a defendant or defendants were non-residents, and perhaps it was not expected by its framers, that the latitudinarian construction now contended for, would ever be asked of the courts; to wit, that a court of equity might take jurisdiction of non-residents, in all cases where the ground or cause of action or the transaction on which the bill may be filed took place within the limits of this state, even though there might be no material defendant within its jurisdiction upon whom to serve process. But whether this be the true construction of the statute or not, it is not necessary for us now to determine, as we are satisfied this case does not fall within its provisions. A very ingenious argument is made upon the word "transaction," as contradistinguished from the words, "ground or cause of action," but we think with more ingenuity than reason. This statute increases the jurisdiction of courts of chancery as to the persons of non-residents, to a considerable extent, under any construction, but to a very great and what may be a dangerous extent, under the construction contended for; and the proviso that it shall not extend to any cases where the ground or cause of action, or the transaction out of which the controversy arises, did not take place in this

state, is a wise one, and must be enforced according to its spirit and meaning. NASHVILLE,
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It is admitted, that the ground or cause of action against L. Tiernan and Sons did not take place in this state, but it is said, that the transaction on which the bill is brought did, and an attempt is made to show that the drawing the bill of exchange, the assignment of an interest in the bill of lading, and the information thereof, which was communicated to Charles Tiernan in this State, constitutes the transaction. This is clearly fallacious. They form a part of the transaction, but by no means the whole; if they did, no recovery could ever be had against L. Tiernan & Sons. The drawing the bill was necessary to the creation of the debt; the assignment of the invoice, to the creation of the lien, and the notice thereof, to effect the conscience of the consignees, and to make them trustees for the complainant; but it was the reception of the tobacco, the sale and receipt of the money that fixed their liability, and that took place in the State of Maryland. The transaction then did not take place in Tennessee. Portions of it did, but that portion of it which is the gist of this proceeding, without which L. Tiernan and Sons could never be made responsible, did not.

The word "transaction" is spoken of as an entire thing, and if it does not take place within the state, the statute does not apply. It is manifest, that the act does not contemplate the injustice of compelling non-residents to litigate their rights in the courts of this state upon contracts or liabilities created abroad. Yet such must be its construction if we entertain jurisdiction of this bill. The act of 1801, c 6, § 4, which is also relied on for sustaining the jurisdiction of the court in this case, provides for a different subject altogether; the second and third sections specify the mode by which property of non-resident debtors may be reached by their non-resident creditors, and give a bill in chancery for that purpose upon the production of a judgment at law and execution thereon against the debtor, and the fourth section directs the practice to be pursued in cases of this kind, before a decree shall be given. The fourteenth section creates no new powers;

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wit, that in all cases, except debts contracted in other states, and which had been provided for in the previous section of the statute, upon a return of *non est inventus*, publication should be made as heretofore, that is, as had been provided for by the act of 1787, c 22.

There being nothing then by which the court has obtained jurisdiction of the persons of Luke Tiernan & Sons, the court below committed no error in abating the bill, and we affirm the decree.

Decree affirmed.

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A and W contracted with the defendants to supply the town of Nashville with water from the Cumberland river, and to build and keep in repair "water works" for that purpose. Among other stipulations contained in the contract was the following: "The said A and W further contract, that if at any time after the completion of said works the same shall get out of repair and so remain for the space of ninety days, so that the town is not supplied with water, as herein provided, then the mayor and aldermen for the time being, may take possession of said works in behalf of the corporation, and use and occupy the same as their own, and shall only in such case, be liable to pay the said A and W the one half of the amount by them expended in the construction thereof, over and above the five thousand dollars advanced as before stated." The house containing the machinery of the works was burnt down, and never was rebuilt, and the works rendered useless. The machinery was left upon the lot. The mayor and aldermen, after the expiration of ninety days thereafter, took possession of the lot on which the works were erected: Held, that they were liable to pay A and W one half of what they had expended in the construction of the works over the \$5000 advanced to them, as stipulated in the covenant.

Equity only has jurisdiction of matters of account, where there are mutual accounts, not where the items of account are all on one side.

But if proof of the items of an account can only be had from the defendant, and a discovery is sought for and obtained, in such case equity having possession of the cause for that purpose, will retain it and give full relief.

When the remedy at law is inadequate, or embarrassed, and full relief cannot be had, equity will entertain jurisdiction and afford relief.

Where A and B contracted with C to build water works, &c., and failed to perform all which was incumbent upon them by the time stipulated, which contract they assigned to D, and a subsequent contract was made between C and D, adopting in part the contract with A and B, and waiving the non-performance by A and B: Held, that equity would entertain jurisdiction of a bill by D, to settle the rights of C and D, under both the contracts, the remedy of D, at law, if any, being embarrassed and inadequate to afford full relief.

In the early part of the year 1826, Avery and Ward entered into a covenant with the corporate authorities of the town of Nashville, whereby the said Avery and Ward undertook to complete a contract which one Samuel Stacker had previously made with the corporation, for the purpose of supplying said town with water, to be raised from Cumberland river by means of steam machinery, and distributed from a reservoir to be provided, through pipes along particular streets mentioned in the contract, at the different intersections of which, and also at the corners of the public square,

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public hydrants were to be erected. The said contract with Samuel Stacker, had been put an end to between him and the corporation, after a partial execution of the same, or some imperfect attempt at execution by him the said Samuel Stacker. The covenant of the said Avery and Ward bound them to complete the said waterworks on or before the 1st of January, 1827; and they contracted to pay the corporation, by way of damages, one hundred dollars per month, for the time said waterworks might be incomplete, or left unfinished, after the said 1st of January, 1827. The corporation was to furnish a piece of ground adjacent to the river for the erection of the machinery necessary in raising the water from the river; and which they did furnish. The said Avery and Ward were to have the use of said ground also for the erection thereon of any machinery of their own, which they might choose to put in operation. The said Avery and Ward erected on said ground a saw-mill, and so attached it to the machinery of the water works, as to cause it to be propelled by the same engine which raised the water from the river for the use of the town. The corporation, by the terms of said covenant, were to advance to said Avery and Ward the sum of five thousand dollars, to be used by them for the space of ten years, without interest; and at the end of the ten years, the principal of the said five thousand dollars was to be accounted for by said Avery and Ward in the expenditures made by them upon said enterprise, and whatever excess of expenditure there might be over and above said sum of five thousand dollars, the corporation was to pay to the said Avery and Ward. The said sum of five thousand dollars was to be advanced through the year 1826, as the said waterworks were in progress, and in discharge of claims against the said Avery and Ward on account of the construction of them; and it was so advanced as admitted by the bill. The said Avery and Ward were likewise to have the exclusive privilege of supplying water from the pipes, which were only to be laid in the streets, to individuals, upon their private account, for the space of ten years, upon such terms as they, the said Avery and Ward, could make with individuals. At

the end of said period of ten years from the completion of the water works, the corporation was to take the said works into their own possession, paying to the said Avery and Ward such sum (if any) as they might have expended in their construction, beyond said \$5000, up to the period of the completion thereof, under the contract. It was further covenanted, "that if said works should get out of repair at any time after their completion, and so remain for the space of ninety days, so that the town was not supplied with water as herein provided, then the mayor and aldermen for the time being, may take possession of said works in behalf of the corporation, and use and occupy the same as their own, and shall only in such case, be liable to pay to Avery and Ward the one half of the amount by them expended in the construction thereof, over and above the five thousand dollars advanced as above stated."

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The 1st of January, 1827, came about, and the said water works were not completed. Avery and Ward dissolved partnership; and in September, 1827, the waterworks not being yet completed, the corporation and Avery alone entered into another covenant supplemental to the former, whereby the time for the completion of said water works was extended to the 1st of January, 1828; and the damages which had accrued under the first contract in consequence of the failure to complete the water works by the time agreed on, were remitted. The second contract also provides, that for the purpose of enabling Avery to proceed in the completion of the water works, the corporation is to loan him a thousand dollars more, for the space of one year, at the end of which time it was to be refunded, with legal interest. And in order to secure the repayment of said sum of a thousand dollars and interest, the covenant declares, that the corporation is to be considered as having a lien upon all the machinery and furniture attached to the water works, and also the saw mill. The said sum of \$1000 was to be paid to the order of the said Avery, in such sums, and at such times, as the said Avery might call for the same, in which, he was to be regulated by his progress in the completion of the water works, as far as practicable. The said second covenant furthermore provided,

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that on failure of the said Avery to complete said water works on or before the 1st day of January, 1828, in manner as had been agreed on by the first covenant; he, the said Avery, was to pay to the corporation, for his failure therein, the sum of five dollars for each day thereafter, during which the said works might remain unfinished, or the said Avery might fail to have a good and sufficient supply of water in the reservoir, for the use of the town.

The bill alleges, that after the water works were completed, on the 1st of January, 1828, the said Avery proceeded to supply, and did supply the said town of Nashville, according to contract, with water, without intermission, except for the necessary repairs of machinery, until about the 9th of March, 1830, when the buildings attached to the said works, and the saw mill, were accidentally destroyed by fire, and the machinery of the establishment, upon which the supplies of water depended, were thereby rendered useless. That to re-construct the said works would have required a large sum of money, which the said Avery was too poor to raise, and the corporation would not advance it. That therefore the said works have never been rebuilt; and that the corporation has taken possession of its ground upon which the works stood.

The bill claims of the corporation the sum of \$1987 14 cents, as the balance due Avery on account of expenditures made by him in the erection of the works, after crediting the corporation with said sum of \$5000 advanced by it, and with the further sum of \$640, advanced under the second covenant. The complainant annexes to his bill a complete statement of the account under the two contracts.

It was alleged in the bill that Avery assigned the contracts to complainants, Dyer Pearl & Co. There was a demurrer to the bill, which was sustained by the chancellor.

J. Campbell, for complainants.

T. Washington & Geo. S. Yerger, for defendants.

GREEN J. delivered the opinion of the court.

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The first question presented for discussion is, whether in any form of proceeding the complainants are entitled to recover. It is contended for the corporation that the true construction of these covenants gives to Avery, or those claiming under him, no remedy to recover any part of the cost of erecting the water works, because the buildings attached to the water works were destroyed by fire in 1830, which was a contingency not in the minds of the parties when the contract was made, and was not provided for in the covenant. The words of this part of the covenant are, "And they further contract, that if at any time after the completion of said works, the same shall get out of repair, and so remain for the space of ninety days, so that the town is not supplied with water, as herein provided, then the mayor and aldermen, for the time being, may take possession of said works in behalf of the corporation, and use and occupy the same as their own, and shall only in such case be liable to pay to Avery and Ward, the one half of the amount by them expended in the construction thereof, over and above the five thousand dollars advanced, as before stated." It is argued that the water works were destroyed by fire, and that the defendants could not take possession of them, which they must have done, in order to give Avery and Ward a right of action. This argument is wholly gratuitous, and is founded upon the supposition of facts not stated in the bill. Upon this subject the bill alleges, that about the 9th of March, 1830, the buildings attached to the said works and the said saw mill were destroyed accidentally by fire, and the machinery of the establishment, upon which the supplies of water depended, were thereby rendered useless." It is subsequently alleged, that the mayor and aldermen had taken possession of the lot of land on which the water works were erected, having dispossessed the tenants in possession, by action of ejectment. The statement of the bill is, that the houses and saw mill were destroyed, and the machinery thereby rendered useless. This machinery was not destroyed, but remained upon the lot unrepaired, and when the defendant took pos-

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session of the lot, possession of the machinery was obtained and of every thing else appertaining to the water works, which was not destroyed. It would be too absurd for the defendant to contend, that had a single article of machinery, which was necessary to the complete operation of the works, been destroyed, and had remained unrepaired for ninety days and it had then taken possession, as it has done in this case, it would not have been a possession of the water works, within the meaning of this covenant. But it would be necessary so to contend, in order to maintain the position assumed. The water works did not consist only of the house which was destroyed. The house, the engine, and the machinery for working it, the reservoir, the pipes, the hydrants were but parts of the entire thing, denominated water works. If one hydrant had been knocked down and destroyed, or a pipe for conducting the water had been removed, the water works would have been out of repair. There is no semblance of propriety, therefore, in contending that the destruction of the house was a destruction of the water works, and that consequently the defendant did not take possession of them.

The water works were finished and in full operation, according to the terms of the second contract. The buildings attached to the said works were destroyed by fire, and the works were thereby out of repair, and so remained for more than ninety days, and the mayor and aldermen took possession of the works in behalf of the corporation, and consequently became liable to pay the half of the amount they cost, over and above the five thousand dollars, which had been advanced by it to Avery and Ward.

The statement of the facts of the case in connexion with the terms of the contract, would seem to present a case too plain for debate; nor are there any extrinsic facts which should induce a construction different from that which the face of the covenant would indicate.

The next inquiry is, has a court of chancery jurisdiction of the case? The first ground upon which its jurisdiction is sought to be supported, is that of account. It is true, account is a head of equity jurisdiction, but it is so only in

cases where there are mutual accounts, and not where the items are all on one side. 1 Story's Equity, § 458, 459: 6 Ves. 687, 688. Here the items are all on one side, and consequently the jurisdiction cannot be supported on that ground. It is true, where proof of the items is to be had only from the defendant, and a discovery is sought and obtained, in such case, equity having possession of the cause for that purpose, will retain it and give full relief. 1 Storey's Eq. 458. In this bill there is no discovery asked for, and therefore jurisdiction cannot attach on that ground. There are however cases, where the remedy being embarrassed at law, and full relief cannot be afforded there, equity will take jurisdiction. 1 Story's Eq. § 457. But so far as the question upon the subject of account is presented, we perceive no other difficulties in this case than must exist in every case where there are many items to be proved

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But in another point of view, we think there would be much difficulty and embarrassment in prosecuting this claim at law, even if relief could at all be administered there. In the first place, as Avery and Ward did not finish the works by the time stipulated in the covenant, they could not maintain an action on that covenant alone, because they could not aver a performance on their part, nor could the subsequent contract with Avery, by which the non-performance of the first was waived, be relied on by them to excuse an averment of performance. That contract was not made for them, nor for their benefit. It was made with Avery alone, as an individual, and for his individual benefit. An action upon the first covenant could not be sustained by Avery alone, because it was made jointly with him and Ward. He could not couple the agreement which was made with him alone with the first covenant and sue in his own name; for although Ward relinquished his interest in that agreement to Avery, that only vested in him an equity in the covenant, and not a legal right to sue in his own name. • A suit by Avery on the second covenant would be unavailing, because it contains no stipulation to pay the monies expended in the works. Upon the whole, whether these views would have been taken and enforced, had the remedy been sought in a court of law or not,

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still it cannot but be perceived that much difficulty and embarrassment would have attended an attempt to enforce these agreements at law; and that the remedy would not only have been embarrassed, but inadequate; and this of itself is a ground of equity jurisdiction. Besides this view of the case, it is clear, that if suits could have been sustained at law, two suits would have been necessary, and equity interposes its jurisdiction to prevent a multiplicity of suits. 1 Story's Eq. § 438, 457. Let the decree of the chancellor be reversed, the demurrer of the defendant overruled, and the cause will be remanded to the chancery court for answer and further proceedings.

Decree reversed.

HIGH and WIFE vs. BATTE and BRADLEY.

The vendor of land is not required to obtain a judgment at law for unpaid purchase money, against the personal representatives of the bargainee. He may file a bill to enforce his lien against the land in the hands of the heirs of the vendee, or in the hands of third persons who purchased with notice from him.

Where a vendor files a bill to enforce his lien for the unpaid purchase money of land, the personal representatives of the vendee need not be parties to the suit, unless where the vendee has re-sold the land and it is shown there is a balance due from the purchasers to his personal representatives; in such case the personal representatives of the first vendee are necessary parties.

The facts upon which the judgment of the court is predicated are fully stated in the opinion.

A. Wright, for complainants.

W. A. Cook and Combs, for defendants.

REESE, J. delivered the opinion of the court.

The bill alleges that the wife of complainant, High, contracted to convey and did convey to one Harris, a tract of land, and that for a large portion of the consideration he executed to her his bill single, that Harris sold and conveyed by deed the tract of land in several portions to defendants, who

at the time of the purchase well knew that the consideration was unpaid by Harris to complainants, that complainants are ignorant of the terms of the purchases by defendants, and whether they paid Harris the consideration or not, and that before the filing of the bill, Harris departed this life insolvent. The bill seeks against the defendants, a satisfaction of complainant's lien, as vendor, upon the tract of land for the balance unpaid of the consideration. A demurrer to the bill was filed by the defendants and that demurrer sustained by the chancellor and the bill dismissed, from which decree the complainants prosecute their appeal to this court, and now in support of the demurrer it is insisted, 1st. that before the complainants can maintain their bill against the defendants, they must investigate their debt and obtain a judgment at law against the personal representative of Harris, and 2nd, that the personal representative of Harris should have been a party defendant, or the bill should have alleged that there is no personal representative.

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1st. The first point is attempted to be sustained by the case of *Balentine vs. Kercheville*, determined by this court and reported in 6 Yer. Rep. That case is no authority for such a position. Nothing can well be more distinct than the vendee's specific lien upon the tract of land conveyed by him and the lien between the landlord and tenant created by act of assembly, which constitutes the ground of the decision referred to. The former is in the nature of a mortgage, it attaches itself specifically to the land, whether in the hands of the first vendee or of a purchaser from him, with notice, and upon principle there is no more reason for investigating the fact or extent of indebtedness in a court of law in such a case, than with respect to a mortgage. In either case the fact and extent of indebtedness must be investigated, and it is competent to investigate it where a satisfaction of the lien is sought in a court of chancery, and this whether the mortgagor or his heir or the vendee or purchaser from him be the party defendant. In the case of *Sheratz vs. Nichodemus Sen. and Jr.*, 7 Yer. Rep. 1, where the latter had a deed for the land against which the lien was to be enforced, the complainant brought not judgments, but notes with him into the court of chancery.

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We think, therefore, that the demurrer cannot be sustained upon this ground.

2d. The second ground upon which it is attempted to sustain the demurrer, is, that the personal representative of Harris ought to have been made a party defendant. We are of opinion, that if the bill had shown that there was a balance of the consideration in the purchase of the defendants from Harris, still due to the personal representative of Harris, such representative would have been a necessary party, as interested in the subject of the controversy and in the proceeds of the sale of the land, if a sale had taken place, upon the same principle that it is necessary to make a second mortgagee a party to a bill for foreclosure. But the bill alleges that complainants are ignorant whether a balance of the purchase money is due from the defendants to Harris. The bill then does not show any interest in the land, the subject of controversy in the representatives of Harris, and if it exist it must be shown *aliunde*, in the answer of the defendants or in the proof. But it is said to be necessary to make the personal representative of Harris a party, because he is the debtor of the complainants, and with him should be investigated the question of indebtedness. In a case mentioned in 1 P. Wm's. note, where a bill was brought by a mortgagee against the heir of a mortgagor, it was objected that the executor of the mortgagee ought to be made a party because it did not appear but that he might have paid the debt. But it was ruled that there was no necessity to make the executor a party, and it was said the plaintiff was no ways bound to intermeddle with the personal estate or run into an account thereof, and that if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it. *Buncombe vs. Horsely*, and see also *Fell vs. Brown*, 2 Brown's Ch. Rep. 279. The case in P. Wm's. shows that in this case, if Harris had died without conveying the land, his heir might have been made the party to this bill without joining the personal representatives, and this upon the principle that the lien attaches to the land, that the land, so to speak, is debtor, whether in the hands of the vendee or his heir. The same principle, we apprehend, applies to the present defendants who are purchas-

ers from Harris. They are not entitled to insist that complainant shall intermeddle with the personal estate of Harris or run into an account thereof, and if payments have been made they can prove it. The same point is determined in the case of *Bradshaw vs. Ourtram*. 13 Ves. Rep. 234. In that case, which was a bill against the the infant heir of the mortgagee to foreclose, his mother the executrix, was made a party, and upon argument the bill as to her was dismissed, because not a proper party. See also *Atkinson and Wife vs. Surgoin's adm'r.*, 1 Yer. 400. We are therefore of opinion that upon neither ground can this demurrer be sustained.

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Let the decree be reversed, the demurrer overruled and the cause be remanded to the chancery court, where the defendants will answer and further proceedings be had.

Decree reversed.

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ROSS vs. WHARTON.

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A distributive share of an estate does not vest in the husband of the distributee until reduced to possession, and in case of his death before such possession, it survives to his wife

A died leaving a large personal estate to be distributed between his wife and two children. His wife and another administered upon his estate, and she took all the personal property into possession and held it for more than two years. The widow again married, and the property continued in her and husband's possession until his death. There was no division of the property during the second husband's life; Held that the possession of the wife before marriage was merely as administratrix or trustee, that the possession of the husband and wife after marriage was as administrator and administratrix, and that the property not having been distributed or divided in the life time of the husband, there was not such a reduction into possession by the husband, as vested the wife's share in him, and consequently it survived to her.

Possession of a distributive share of the wife by a second husband as administrator, &c., is not such a possession as will prevent the wife's right of survivorship, in case of his death.

The facts of this case are stated in the opinion of the court.

J. Campbell and W. E. Anderson for complainant.

R. J. Meigs and J. Rucks for defendant.

REESE, J. delivered the opinion of the court.

William T. Ross is the administrator of Wm. D. Thompson deceased, who in the summer of 1834, intermarried with Susan S. Fain, the widow and relict of Samel Fain, deceased. Thompson in the early part of the year 1835 departed this life, leaving his wife surviving. Her first husband died intestate, and his widow and two infant children who survived him, were entitled to distribution of his personal estate, which was large, consisting then of twenty-four negroes and now of thirty or upwards, and of stock, household furniture &c., and debts due to him. Administration on his estate was granted to his widow, and to George R. Wharton, and the bill alleges that the former attended chiefly to the administration of the personal estate, that nearly all the debts had been paid, that the negroes remained upon the farm of the deceased, where lived the widow with her infant children, that they had never been divided up to the time of Thompson's death and have not yet been, that the negroes were taken and held by the ad-

ministratrix as aforesaid, in the character of administratrix, NASAVILLE,
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until it was manifest that the same would not be required to
pay debts, and that after that time she held the same undivided in her own right as tenant in common with said infant children, having the same in actual possession as aforesaid, and that upon the marriage of the said Wm. D. Thompson with the widow of Fain, he from that time till his death held the said negroes in his own right as tenant in common with the said two children, undivided, having the same in actual possession, and being the absolute owner of his wife's share in said negroes, and holding them for his own use and benefit and not as administrator. The bill also states that he had exchanged one or two of the negroes for others. The bill states that the widow of Thompson, and the guardian of the two children claim the negroes exclusively, and repel the claim of Thompson's representative, the complainant, and prays that the negroes in specie may be delivered to complainant, and for an account. To the bill there was filed a demurrer which the chancellor sustained and decreed the bill to be dismissed, and the complainant by his appeal has brought the cause into this court. The enquiry now is, was there on the part of Thompson such a reduction into his possession of the distributive share of the wife in the negroes in controversy, as that the same shall not survive to her as administratrix of Fain, and as a distributee of his estate, but go to the personal representative of the husband? In the threshold of the enquiry, it is conceded by the complainant in argument, that if the possession of Thompson in his life time, though actual, were only as trustee and administrator, his personal representative could not claim, but the wife would be entitled by survivorship. It is alledged however, that being both administrator and distributee, and having the negroes in actual possession, it was in his power without suit, without division, or other positive act done, to claim and possess as distributee and owner, and not as trustee and administrator; and to prove this we are referred to the case, first of an administrator who is a creditor of the estate upon which he administers. As to such a case it is said that all whose debts are of higher grade can compel payment, but as against all of equal or inferior grade he is en-

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titled to his retainer, Toller 295, which is said to arise from the mere operation of law and from the necessity of the case, being unable to sue himself, and therefore that the property taken as administrator is changed and by force of law vested in him as owner. But does the analogy apply to the case before us? Here the suit was for creditors and for the other distributees. Could he not if the creditors had been paid, sue the distributees, if unable from infancy to adjust the matter and have a division and enjoy his distributive share in severalty? The creditor who is administrator cannot sue himself to ascertain his debts and have execution of the assets, he must therefore retain, and the property or rather the proceeds of it by operation of law becomes his own.

But the administrator who is also the co-distributee of others, is subjected to no such necessity. To make anything of the analogy insisted on, a case must be selected where the administrator is sole distributee, as the father who administers upon the estate of an unmarried son, or the husband to recover the choses in action of his deceased wife. In such case, except as to creditors, the administrator would be owner, and debts being paid, could by operation of law and without suit claim as such. And second, it is said that though for two years after administration granted, the administrator would be presumed to hold in that character, yet after two years the presumptions of law are reversed, and he is to be taken to have held as distributee. This legal postulate we do not think is established by the cases referred to for that purpose. 4 Mason 136: 6 Yer. *Bosly vs. Carroll*. These were cases where the administrator having also become guardian and being himself liable in both characters, his securities in the latter character, and not in the first, were held liable; not upon a presumption arising from operation of time merely, but from the act done, the assumption of guardianship and giving bond. It would be very unsafe on the ground of such presumption to permit a trustee receiving and holding property in that character, to denude himself of the trust by the supposed operations of his own mind and will, and without any positive act done to apprise all interested of such a change of character. But it is said again that a distributive share may be assimilated

to legacies, in which case the assent of the executor being necessary to the legacies, he may assent to his own, and that assent may be either express or implied. Toller 345.

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The assent of an executor is necessary to give to the legatee a title to claim and receive the legacy, because he is supposed to be acquainted with the state of the debts and the assets, and to know whether the legatee will be called on for contribution or not. But a distributive share is very unlike a legacy, and if it were not, we would say *similis non est idem*. When was it ever heard in the same sense, that an administrator assented to a distributive share. A legacy is the gift of the testator, a distributive share of the law, and if there be any resemblance between them, it is between a distributive share and a general residuary legacy, after the payment of all debts and all other legacies, in which last case it would be difficult perhaps to find much on the subject of the executor's assent in behalf either of himself or others. We think the authorities prove, that a possession such as Thompson had in this case, cannot be regarded as a reduction of the property of the wife into possession so as to defeat her title by survivorship. In the case of *Baker vs. Hull*, 12 Ves. Rep. Hall was sole executor, and having proved the will, he entered upon and took possession of the real and personal estates of the testator, and afterwards disposed of part thereof. He married Elizabeth Baker one of the residuary devisees under the will, and died leaving her surviving; and one question in the case was whether Hall by entering into possession of the real and personal estate of the testator, as the only acting executor and trustee under the will, and disposing of part, had sufficiently reduced into possession his wife's share, so as to give him an absolute title transmissible to his representatives. And as to that question the master of the rolls said, "the husband must be considered to have entered into possession of the real and personal estate of the testator, as trustee and executor of the will only, and not as husband, and therefore his wife's share of the residue would not be deemed sufficiently reduced into possession so as to prevent its surviving to her upon his dec ease."

And in a case in 16 Ves. 415, it was determined, that the actual transfer of stock standing in the name of the wife to the

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husband, but transferred to him as trustee for the wife, would not bar the wife's title by survivorship, and upon the ground that the transfer was made *diverso intuitu*." The case of *Wallace vs. Taliferd*, 2 Call's Rep. establishes the same point. That was a case of a will and a legacy of slaves to a married woman after payment of debts, and the husband was appointed executor and died. It was decided that the property which was negroes, survived to the wife. The case in 3 Des. Rep. 155, *Elms vs. Hughes*, is very strong to the same point. Indeed that case is identical with the case before the court. That was a case where one dying intestate, left a widow and children, a plantation and negroes. The widow administered, and then married a second husband. The family remained on the plantation, the negroes were in the actual possession of the husband. He died and his personal representative claiming adversely to the wife's survivorship, the chancellor said, "it is insisted that the right of the wife to a third part of the personal estate was not a chose in action, it was a right to an undivided portion of negroes actually in possession, that the writ of partition which was necessary was merely to divide property in possession, and this was totally different from a chose in action." To this objection the chancellor replied that "as a writ of partition was necessary to divide the personal estate to enable Mr. Elms to hold his wife's share as husband, and as whenever a suit is necessary to establish or to give effect to a right, it is a right of action, and as Mr. Elms died before his wife, the right and the possession was not so vested in Mr. Elms, as husband, as to establish his property in the personal estate, but the same survived to his widow." This opinion of the chancellor was unanimously affirmed upon appeal by the appellate court.

It is true as was determined in the case in 1 Yer. Rep. 413, that administrators, who are also distributees, are not under all circumstances to bring suit for petition or distribution, but they and the other distributees may agree upon and adjust the terms of settlement among themselves. But in the cases in South Carolina, and in this case, that could not be done. Here were infants of tender years and without guardians, so far as appears; at least the partition was not in fact made, and it is

believed it could not have been except by suit, in the situation and circumstances of the parties. The case presents many other considerations tending to show the invalidity of the claim set up by the complainant. Why is it confined to the negroes? Was not the stock, household furniture and debts collected, in the same manner in the actual possession of the administrator, Thompson? Did he hold that portion of his wife's distributive share as administrator and the negroes only *diverso intuitu*? Did he by the operation of his own assent, mind, or will, denude himself of the trust *pro tanto* only and as respects the claims, while his fiduciary character as to the balance of the property continued? And what effect had his supposed determination to claim for himself upon the title of the negroes? Did he continue to hold the entire legal estate and an interest only as to two thirds for the children? Is it not obvious, now, that the character of the possession, and the relations of the parties were such, that relief could not be given to the complainant by partition and delivery of one-third of the negroes in specie, but that the whole personal estate, and the entire marshalling of assets would necessarily, if complainant were entitled, constitute a subject of enquiry?

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And finally, it is said for complainant that whatever may turn out to be the rights of the parties upon investigating the facts, yet the demurrer looks to the allegations of the bill, and cannot be sustained, because the bill alleges that Thompson held the negroes undivided for his own use and benefit, as to one third, and not as administrator. The bill states that the negroes of the estate of Fain all continued upon the farm, where also lived the widow and children, that they were taken and held by the wife as administratrix. Circumstances and relations with regard to the property and the parties, are stated in the bill, inconsistent with the averment, that Thompson held an undivided third part for his own use and benefit, and not as administrator. No act is alleged to have been done, no fact is averred, the operation of which in point of law could control or change the circumstances and relations with regard to the parties and property which previously existed. Certainly the alleged exchange of one or two of the negroes for others could not have that effect. We think, therefore, that the de-

NASHVILLE, murrer to the bill was properly sustained by the chancellor,
December 1836. and we affirm his decree.

Brightwell
v
Mallory

Decree affirmed.

BRIGHTWELL vs. MALLORY.

A stockholder in a bank has an entire and perfect ownership over his own stock, and may sell and transfer it to whom he pleases, and from doing which, the bank has no power to restrain him.

Stock in a bank entitles the owner to his proportion of the dividends which may be declared from time to time, and when the institution closes its business, to his proportion of the capital stock and profits which may remain to be divided.

Before bank stock can be sold in equity under the act of 1832, c 9, to satisfy a debt, there must be a judgment and execution against the debtor.

A bill is filed against the owner of stock to have it sold, and the bank is made a party. The bill alleges there was a judgment and execution against the owner, a decree was pronounced ordering the stock to be sold, from which the bank, but not the owner appealed: Held that the bank has no right to call in question the validity of the judgment.

For the facts of this case, see the opinion of the court.

W. A. Cook and W. Thompson, for complainant.

W. E. Anderson and Geo. S. Yerger, for defendants.

GREENE J. delivered the opinion of the court.

The bill which was filed the 1st day of April, 1835, alleges that the complainant in 1833 recovered a judgment against the defendant, Mallory, as sheriff of Stewart county, for the sum of \$209 37, debt and damages and \$6 44, costs of suit. That an execution had issued and the sheriff had returned "no property found." The bill also alleges that Mallory is insolvent, and has no property whereon to levy, but that Mallory owns a large number of shares of the stock of the Bank of the State of Tennessee, at the branch at Clarksville, but to what precise amount complainant does not know. The bill further states, that said branch has been discontinued, and the books removed to Nashville and put into the hands of Robert Far-

Farquharson, where it can be ascertained how much stock said Mallory owns. The bill prays that said Mallory, Bank and Farquharson each be made defendants, and that they answer and discover how much stock said Mallory owns in said bank, and that an injunction issue to prevent a transfer of any part of it, and to restrain the payment to Mallory of any dividends.

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Robert Farquharson answered for himself and the bank, and states that Mallory was the owner of twenty shares of the capital stock of said bank, on which had been paid \$500, that in November, 1819, he had borrowed of the bank \$500, for which sum his note was discounted in said bank, which was continued under discount until 8th February, 1822, when he receipted for \$375, it being three fourths of his stock, which was applied to the payment of his note, leaving a balance of \$125, due the bank, and he still retained one fourth of his stock worth \$125. On the 1st day of January, 1833, half the remaining stock, \$62 50, was applied to the discharge of so much of his note, and on 1st January, 1835, one half the balance, \$31 25, was applied in the same manner, leaving of stock, \$31 25, and a like sum due the bank. The bill was taken for confessed against the defendant Mallory, and the cause was regularly set down for hearing as to him *ex parte*.

The chancellor decreed that the stock of the defendant, Mallory, which had not been transferred by himself consisting of five shares at twenty five dollars each, be sold and the proceeds be paid to the complainant. From this decree the Bank appealed, and it is now insisted that the Bank has a right to retain this stock in extinguishment of its own debt. In the first place it is insisted, the money is in the hands of the Bank, and having the money in its hands, and as good an equity that it shall be applied to its debt, as the complainant has to obtain it in extinguishment of his claim, there is nothing to move a court of equity to take it out of the hands of the one to give it to the other. If the facts upon which this argument is made were as the counsel supposes, there would be much force in the position. But it is a mistake to suppose that the stock of an individual, consists of so much money owned by him in the bank. The money in the bank is the property of the institution, and to the ownership of which, the stockholder has no

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more claim than a person has who is not at all connected with the bank. The stockholder has an entire and perfect ownership over his own stock and may sell and transfer it to whomsoever he pleases, and from which the bank has no power to restrain him. Angel and Ames on Corporations, 318, 319: 3 John. Cases, 238:: 3 Pick. 9.

This stock consists of a certificate of the bank that the stockholder is entitled to so many shares of the capital stock of the bank. It entitles him to his proportion of the profits or dividends which may be declared from time to time, and when the institution closes its business, to his proportion of the capital stock and profits which may remain to be divided. The stock of an individual, is then, property in his own hands and subject to his own control. By the act of 1832, c 9, § 1. it is made liable to the payment of debts in the way this stock is sought to be reached by the present bill.

But it is said that act requires that there should be a judgment and execution against the debtor before his stock can be made liable, and that this judgment is void and therefore does not authorise this proceeding.

It is true, that if the judgment which is proved were void and Mallory were resisting it, no decree could be made; but here Mallory does not resist it.

The bill alleges the existence of a judgment and execution, and Mallory having failed to answer, the bill is taken for confessed, and a decree was made accordingly. The bank was no necessary party to the bill in order to subject the stock of Mallory to the payment of his debt. The only reason for making the bank a party was to get a discovery of the number of shares owned by the defendant, and to have the bank before the court, that it might be compelled to make such transfer of the stock on its book as the court might direct.

Mallory did not appeal, and the decree ordering a sale of his stock remains in force and unappealed from. As the bank has no interest in this question, we think it has no right to resist the decree or to call in question the validity of the judgment against Mallory. Let the decree be affirmed.

Decree affirmed.

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CAMPBELL vs. RICE.

Campbell
v
Rice

Where a decree is rendered and the court, afterwards, at the same term ordered, "that the decree should stand open to be revised at the next term upon a point reserved, but that in the mean time the decree be in all things executed notwithstanding the order, and that unless the decree be revised at the next term this order to have no effect whatever." Held, that the case must be reheard upon the point reserved at the next term, and could not be heard afterwards, and that the neglect of the clerk in sending the papers and records to another place to which the court had been changed by the legislature, will not alter the legal effect of the order.

W. E. Anderson and W. Thompson, for complainant.

J. Campbell and S. Turney, for defendant.

TURLEY, J., delivered the opinion of the court.

In this case a final decree was given at the August term, 1834, of the supreme court at Sparta. On motion for a rehearing, it was ordered by the court, "that the decree stand open to be revised at the next term of the court, on a point reserved, but that in the mean time the decree be in all things executed according to its terms, notwithstanding the order, and that unless said decree should be revised at the next court, this order to have no force or effect whatever."

This we consider to be an order for a rehearing, strictly limited to the next term of the court, as contradistinguished from a general order, which would have left the case open in court until it was reheard, or in other words, that the case may be reheard at the next term of the court upon the point reserved, but not thereafter without the further order of the court. If the power to make this limited order be conceded, which it is, the case is then *res adjudicata*. If the order be correctly made, then the necessary consequence is, that if the term be permitted to elapse without a rehearing, the order is *functus officio*, and the case at an end. This view of the case is not perhaps denied, but it is said that at the next ensuing term, to wit, August, 1835, the cause was continued under the rule prescribed at the preceding term, and that this revived the rule; so we think; but then by the same reasoning, the case must have been heard at the next succeeding term, which was on the 1st Monday in March,

NASHVILLE, 1836, which was not done. But it is said that during the term which intervened between the last term of the court at Sparta, and the first at Nashville, by the constitution of the State, and an act of the legislature passed on the 1st day of December, 1835, the Supreme court which had formerly sat at Sparta was removed to Nashville, and that it was made the duty of the former clerk of the court at Sparta, to deliver or cause to be delivered, all the papers of that court to the clerk of the court at Nashville, on the 1st Monday of March, 1836, which he neglected to do, by reason of which the case was not heard, and that therefore they ought not to be prejudiced thereby. To this reasoning we cannot assent. It may be a hardship, but the principles of law cannot be made to yield to the neglect of persons engaged in its administration, or otherwise its legal certainty would be destroyed. The question before us, is not whether the clerk did his duty, but whether a term of the court commenced at Nashville on the 1st Monday of March, 1836, and whether it was permitted to elapse without the decree having been revived. It is obvious that it did. Then the condition upon which the rehearing was given has not been performed, and the matter is as much beyond our control as any other order or judgment of a former term.

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v
Wilson

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Decree affirmed

WILSON vs. WILSON.

A bill of review will not lie in the supreme court to review or reverse its own decree.

The bill in this case was filed to review and reverse the decree formerly rendered in this cause, (see 8 Yer. Rep. 67. A motion was made by the complainant's counsel to take this bill from off the files of the court, upon the ground that no bill would lie in this court to review its own decree.

W. E. Anderson and J. Campbell, for complainants.

F. B. Fogg and Thompson, for defendant.

TURLEY, J. delivered the opinion of the court.

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Two questions are presented in this case for the consideration of the court.

Wilson

v

Wilson

1st. Can a bill filed to review a decree of this court be sustained? This question has been determined in the negative in the case of *Cox, Catron and McLemore vs. Stump, Sommerville and others*, 2 Yer. Rep. That case, it is true, was heard and decided by two judges specially appointed, but they are of known ability. We recognise the authority of the decision and have at the present term of the court in the case of *Overton vs. Bigelow*, reiterated its reasoning.

2d. It is said that though this be true, yet this is a decree for alimony, which may at any time be modified and changed by the court, so as to be made suitable to any change which may have taken place in the property of the defendant after the decree may have been given. Without determining the merits of this question, it is sufficient for us to say, that if this proposition be true, a petition setting forth the facts on which a modification of the decree is sought is the proper remedy. This is a bill asking not for a modification of the decree, but for a review and reversal of it for errors apparent in the body of the decree. This cannot then be considered as a petition merely to change the decree, so as to suit any alteration which may have taken place in the situation of the parties since it was pronounced. We are therefore of the opinion the motion to have this bill of review taken from the files must be allowed.

Motion allowed.

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v
Burge

HARDEMAN vs. BURGE, et. al.

Whether a judgment has been paid by a third person for the debtor, or has taken an assignment of it to himself, as a purchase, depends upon the proof, if the latter, it is not an extinguishment of the judgment.

A joint owner of a steam boat conveyed in trust his interest therein to secure debts, on one of which the other joint owner was liable as security; a judgment was obtained against the latter, and his interest in the boat levied on and sold: Held, that the validity of this sale could not be affected by the deed of trust, and the neglect of the trustee to sell under it, or his refusal to agree that the whole boat should be sold at the same time.

Before a court of chancery can rescind a contract for mere inadequacy of consideration, it must be gross and shocking, such as is equivalent to proof of fraud.

Courts of chancery exercise the power of modifying and setting aside awards for fraud or mistake, but this power will not be exercised unless the proof is clear.

The facts of the case are stated in the opinion of the court.

J. Campbell, for complainant.

Geo. S. Yerger, for defendant.

TURLEY, J. delivered the opinion of the court.

Complainant by this bill seeks to be restored to the possession of the four tenths of the steam boat Jefferson; to have an account of the profits from the time he was deprived thereof, and to have an award between him and his co-partner, Burge, opened in order that he, Burge, may be charged with the additional sum of four hundred dollars of partnership funds received by him, with which he neglected to charge himself, and which by forgetfulness and mistake was not brought before the arbitrators.

We are of opinion that the sale of complainant's interest in the steam boat Jefferson, under execution, on 4th May, 1833, was legal, and passed his interest to the purchaser.

The proof does not sustain the position, that the execution was satisfied by Thomas Hardeman and James Johnson before the sale. Johnson in his answer expressly states, that on 4th May, 1833, he and Thomas Hardeman agreed that they

would jointly pay the execution, and that the same should be transferred to Hardeman, as the friend of his father. The deposition of Hicks states that the payment was made on 4th May, 1833; and that in consequence of said payment, he transferred the benefit of the execution to Hardeman on the same day and before the sale. The deposition of Thomas Hardeman expressly denies that the intention was to satisfy the execution, but on the contrary, that his design was to purchase it, and that he did so on the day of sale, and took an assignment of the interest therein—the return of the sheriff on the execution shows that the sale was made on 4th May, 1833, agreeing therein with the answer of Johnson, and the deposition of the witnesses referred to. There is nothing in the deposition of W. Williams, which when properly understood contradicts these facts. He says, when he arrived in town on the day of sale, he was informed that the boat was not to be sold, that the matter was in some way arranged, but that in the afternoon he was directed to sell; which he did. This does not prove that the matter was arranged by a payment of the execution, and is not at all inconsistent with the allegation, that it was arranged by a payment of the money, and a consequent assignment of the execution. The circumstances of the case go to strengthen this position. At the time the arrangement was made with the plaintiff in the execution, it was believed that Thomas Hardeman was the agent of complainant; the power of attorney constituting him such, had been returned for further ratification, and no doubt could have existed that it would receive it, and the intention in taking the assignment of the execution was not to sell the boat under it, but to protect it for the benefit of complainant, and to keep up the lien of the execution. But in the morning of the day of sale, and after this arrangement had been made, a messenger arrived from complainant, with the information, that he had cancelled the power of attorney the day before, so that at the time the arrangement was made, Thomas Hardeman was not his attorney in fact, and had no power to act for him, the consequence necessarily was, that it had to be considered as an individual transaction; and for the purpose of making all things secure, it was thought advis-

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able to proceed with the sale, which was accordingly done, and Thomas Hardeman became the purchaser, he admits, with the view of giving the complainant the benefit, and even perhaps without such admission under such circumstances, as would constitute him a trustee for the complainant.

The validity of this sale cannot be affected by the existence of the deed of trust to Johnson, nor his neglect in not selling under it. There is nothing in the case that looks like fraud in the execution of the deed of trust. Johnson was largely bound for Burge; he did not take an unreasonable amount of property to secure him against loss on these liabilities, nor did he grant any favor or indulgence, inconsistent with the rights of other creditors to Burge. Complainant was no party to the deed of trust, and although the debt for which he was bound, and for which his share of the boat was sold, is provided for with others in the deed of trust, yet it does not appear that he ever gave his consent thereto, or in any way whatever requested the trustee to execute the trust, but on the contrary, he alleges in his bill, that the deed of trust was fraudulent, and seeks to have it cancelled.

The trustees not selling the property in time to meet the debt, even if complainant were in a situation to ask relief therefor, would be mere neglect and no fraud, unless done with a fraudulent intention, which must be proved.

The legal right to the complainant's interest in the boat then passed by the sale to Thomas Hardeman, as trustee for his father; he afterwards sells the interest to Burge, for \$1200, and conveys it to others for his benefit, and the question is, whether this sale shall be set aside as fraudulent against the rights of complainant the *cestui que trust*. We think not; the sale was made by the directions of complainant, as is proved by Thomas Hardeman, and the surplus left after paying the purchase money of \$500 advanced by Thomas Hardeman, was appropriated to his use. It is true, that his share of the boat was sold at a low price, but before a court of chancery can rescind a contract for inadequacy of consideration, it must be gross and shocking, such as is equivalent to proof of fraud in the transaction. There is no such inadequacy here; the value of steam boat property is fluctuating, depending upon a variety

of circumstances, which may be changing every day, and therefore cannot be brought to any fixed or certain standard.

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In this instance four-tenths of the boat was sold for \$1200, and some time afterwards five-tenths thereof at public auction, under the deed of trust only brought \$2100, and bought in at that for the benefit of the *cestui que trust*. Surely no one can contend, that this difference is such as shocks the mind.

But it is said that this interest might have been sold for more, if Burge and his trustee Johnson, would have agreed to sell the whole boat at the same time. To this it is sufficient to say, they were not bound to do so. There is no evidence that any means were used by Burge to force a sale of complainant's interest, and under such circumstances, as to buy it at a sacrifice, and we cannot presume it. For these reasons we cannot rescind the contract.

As to opening the award, we are of opinion it cannot be done. Though courts of chancery do exercise the power of modifying and changing and setting aside awards, when they have been erroneously made by fraud, accident, or mistake, yet the case must be clearly made out before this power will be exercised, and the proof is upon complainant.

There is no such proof here—there is an allegation in the bill that an item of \$400 was by mistake overlooked, but the answer does not admit it, but argumentatively denies it. In the absence of an admission of the fact, by the defendant in his answer, there must be proof from the complainant establishing it. We therefore think there is no error in the decree given by the chancellor, and order it to be affirmed.

Decree affirmed.

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LEWIS, *et al.* vs. McLEMORE, *et al.*

Lewis
▼
McLemore

If a party innocently and by mistake misrepresent a material fact, upon which another party is induced to act, it is as conclusive a ground for relief in equity as a wilful and false assertion.

The commissioners of a town, in selling the lots, represented that there was along the whole extent of the town a first rate steam boat landing *all seasons of the year*; that the landing was one of the safest and best on the Mississippi; that on the west side of the river, immediately opposite the town, there was more elevated ground than was to be found on that side of the river, and that the nearest and best road could be made from that point to Little Rock. These statements were made in good faith, but were in fact untrue: Held, that the representations were material, and although there was no actual fraud upon the part of the commissioners, yet as the purchasers of the lots were induced to purchase under a supposition that they were true, they were entitled to relief.

One of the judges of the court was ineligible by the constitution to sit in this case and the subsequent one, of *Caldwell vs. Knott*. John Cocke, Esq. of Grainger county, was appointed by the Governor, Special Judge, to try both of said causes. The opinion of the court, as delivered by him in this case, states all the facts necessary to be noticed.

A. O. P. Nicholson and W. A. Cooke, for complainants.

F. B. Fogg and W. E. Anderson, for defendants.

COCKE, (Special Judge,) delivered the opinion of the court.

The complainants filed this bill to be relieved from the payment of certain notes, or bills single, executed by them to the defendants, the consideration of which, was the purchase of certain lots in the town of Fulton, laid off by the defendants on the bank of the Mississippi, and sold by them at public sale. The relief sought, is predicated upon the ground of fraud and misrepresentation in their advertisement of the sale of the lots, in said town of Fulton. Amongst other numerous charges, not deemed necessary to notice, it is stated in the bill, that the defendants, in said advertisement represented that they were the owners of one hundred acres of land on the Mississippi river, a few miles below Flower island bluff, and a short distance above the mouth of Hatchee river,

including in part, that extensive and elevated bluff on the east side of the river, at the most eastern bend thereof, along the whole extent of which one hundred acres, there is a first rate steam boat landing all seasons of the year, and that it afforded one of the safest and best steam boat landings on the Mississippi river, and was distinguished and used as such at that early day. And farther, that on the west side of the river, immediately opposite the one hundred acres, there was more elevated ground than could any where else be found on that side of the river, and that the nearest and best road could be made from that point to Little Rock. These representations the bill alleges are wholly untrue. The answer admits the advertisement was made as represented in the bill, and insists that the representations are true in substance; and if not, insists, that the complainants should have examined the matter for themselves. It is proved that the landing is not such as was described; that in consequence of a bar, part mud and part sand, there is not a first rate boat landing all seasons of the year; that there is a tolerable landing in middling and high stages of the water, but in low water the landing is bad, and confined to a small part of the extent of the one hundred acre tract of land, and that the bar existed at the time of sale, and is a great obstruction to the landing of steam boats. It is also proved, that the country on the opposite side of the river from Fulton, is made up of ponds, swamps, and sunken ground, and is wholly unfit for a road.

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In the argument of this case it was insisted, that the advertisement found on the record, and containing the representations, was not proved to have been published by the authority of the commissioners, and was no evidence of the facts set forth in the advertisement. It is true there is no proof, other than what is contained in the answer, that they caused the advertisement, to be published. But the bill charges, that the advertisement and the representations made in it were made by the commissioners. The answer admits this charge, but insists upon the truth of the representations, and that the bar does not form an insuperable impediment to a good landing for boats. The court is satisfied, that in making these representations no fraud in fact was intended. There is no

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proof showing that the commissioners made the representations set forth in the advertisement, knowing them to be false, but they were great inducements to purchasers, and that they caused the lots to sell much more advantageously than they otherwise would have done, is manifest. A steam boat landing, such as this was represented to be, in laying off a new town situated as this, was a great *desideratum*, and when we connect with this, the fact, that the purchasers believed the ground on the opposite bank was of so elevated a character, as to present the best and most advantageous site on which to make a road to Little Rock, they would naturally conclude, that a place possessing such natural advantages must in a short period of time, be one of great importance. Under such circumstances, they would feel safe in investing their funds in the purchase of lots, under a belief, that in process of time the investment would be profitable. If the representations in point of fact were incorrect, the value of the lots would be much less than they otherwise would have been, and the party purchasing would be greatly injured. It is evident from the proof in the case, that the purchasers were induced to buy lots, under the belief that these natural advantages existed. If they do not exist, the main inducement which caused them to purchase has failed, and they have been deceived by the representations of the defendants, and are greatly injured thereby. These representations were made as the court believes under a full belief of their truth, on the part of the commissioners, who cannot therefore be charged with intentional fraud. But the purchasers acted on the faith of them, and with the settled conviction that they were as represented by the defendants; and so far as their interest is concerned, they are as greatly injured as if they were fraudulently made.

Whether a party misrepresenting a fact, know it to be false, or made an assertion without knowing whether it was true or false, is wholly immaterial. It has been correctly said, to affirm what one does not know or believe, is unjustifiable, either in law or morals. 1 Story's Eq. § 193. And indeed it seems now to be well settled, that if a party innocently misrepresents a material fact by mistake, upon which the

other party is induced to act, and does act, it is as conclusive a ground for relief in equity, as a wilful and false assertion, for it operates as a surprise and imposition on the other party. 1 Story's Eq. 202, and cases there cited. *Rosebelt vs. Fu'ton*, 2 Cowan's Rep. 139, 134, and 125: *Pearson vs. Morgan*, 2 Brown's Chan. Rep. 385: *McKenon vs. Tayler*, 3 Cranch, 270.

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According to the above principles, it will at once be seen that a court of equity cannot withhold its hand in extending relief in this case, however innocent of actual fraud the defendants may have been. We are of opinion, that the decree of the chancellor be affirmed.

Decree affirmed.

CALDWELL, et. al. vs. KNOTT.

Where there is a clear and certain right to the enjoyment of property, and an injurious interruption of that right, and where the injury is immediate and irreparable; and the remedy at law is from the nature of the injury imperfect, a court of chancery will entertain jurisdiction and give relief.

But if the right is not clear and manifest, and inconsistent with the assertion of a similar right in the defendant, a court of equity will not interfere until the right is ascertained at law.

The complainants' land was flooded by the mill pond of the defendant, and his spring injured. The defendant by way of defence, relied upon a parol license given by the complainant's ancestor to build the pond and overflow his land: It was held, that whether or not the parol license was binding, or could be revoked was a legal question, and that the complainant could not resort to a court of chancery to destroy the dam until that question was determined at law.

Query, Whether a parol license to erect a mill and to overflow land, can be revoked, after considerable expense has been incurred, in erecting the mill and dam.

Where the defendants mill dam, which overflowed complainants land, had been built more than ten years before the bill was filed, this was held to be such laches as prevented the interference of a court of equity until the right was tried at law.

The facts of the case necessary to be stated, will be found in the opinion of the court.

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T. H. Cahal, for complainants.

G. S. Pillow, for defendant.

COCKE, (Special Judge,) delivered the opinion of the court.

The bill in this cause is filed to abate or prostrate a mill-dam, erected by the defendant, and which the complainants allege, throws the water back and dams up and destroys the only lasting and valuable spring upon their tract of land, which is situated on the verge of the creek. The defendant relies upon two grounds of defence. 1st, he insists that if there is any such spring, it is situated in the bed of the stream, so that the creek in its natural state floods it at all seasons of the year, when the pond affects it, and that the mill pond does not injure the spring; 2d, he insists that the rights of the plaintiff ought to have been tried at law, and that this court has no jurisdiction. The proof in this cause is voluminous, but it is unnecessary to examine it in detail. It appears however to be substantially proved, that before the mill was built, Parris F. Dooly, the owner of the land, who was the father of complainants, and the former husband of complainant Cynthia, consented to, and aided in building the dam; this was in 1823. Dooly died in 1829, and there is no evidence that before his death he ever desired the dam to be demolished. The bill was filed in 1833, about ten years after the mill was built.

It is certainly well settled as a general principle in the jurisprudence of England, in respect to the exercise of all rights, that a man must enjoy his property in such a manner as not to injure that of any other person. 2 Black. Com. 215. Therefore every diversion, obstruction, or other act in relation to streams of water, which is collaterally or consequentially injurious, is obviously repugnant to this principle, and is a species of tort denominated a nuisance. A private nuisance, which is any thing done to the hurt or damage of the lands, tenements, or hereditaments of another, is the subject of proceedings at the common law by an action on the case; the party injured recovers satisfaction for the injury sustained, and every continuance of the nuisance is held to

be a new one, for which a new action will lie. See 3 Black. Com 217 to 221. It is manifest, therefore, that the plaintiffs have an undoubted remedy at law, but still in cases where the injury is immediate and irreparable, and where the remedy at law is from the nature of the injury imperfect, a court of chancery will interpose. The foundation of this jurisdiction is the necessity of a preventive remedy. When great and immediate mischief in the comfort and useful enjoyment of property occurs, the interference rests upon the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which upon just and equitable grounds ought to be prevented. 1 Vern. Rep. 127, 275: 16 Ves. 338: 2 John. Chan. Rep. 164, 463. The right must be clear, manifest and undoubted, otherwise a court of equity cannot interfere, until the right is ascertained at law. The right must be exclusive in its character, that is, it must be inconsistent with the assertion of a similar right in the defendant.

The determination, therefore, of opposing rights, is purely a legal question, and until such a determination a court of chancery will not interfere.

In the case before the court, the plaintiff's title to the land on which the spring flows is undoubted, but the defendant sets up by way of defence, the consent of their ancestor to build this mill; that in consequence of such consent it was erected and great expense incurred; that after the mill was built, with a full knowledge of the consequences arising from the erection of the dam, he acquiesced therein until his death. This it is contended, and we think justly, amounts to a parol privilege or license to overflow his land; and whether or not this permission is binding, or can be revoked, is a question determinable in the courts of common law. It is questionable whether a parol consent given to the erection of a mill-dam, or a license to overflow land, after it has been erected by the other party and great expense incurred, can be revoked. The tendency of the modern decisions is that it cannot. 7 Taunt. R. 374; 8 East. 308: 5 Moore and Payne, 712: cited 2 Harrison's Index, 1450. But be this question as it may, this is not the proper forum to determine it.

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Independent, however, of this ground, there is another which is decisive of the cause. The proof shows, that the mill dam was erected and used for ten years before any application was made to this court. In *Weller vs. Smeaton*, 1st Cox's Cases, 103, the lord chancellor, speaking of this head of equity jurisdiction, says, "I take it to be a head of equity to interpose by way of injunction, where a party is building new works upon an old possession; but when the works have been permitted to remain three years, that is considered such laches, as to preclude the party from having relief here, without first going to law." The same principle is asserted by Chancellor Kent, in *Read vs. Gifford*, 6 John. Chan. Rep. 19. In that case the tunnel had been made, and the water diverted upwards of three years. Chancellor Kent, in denying the motion for an injunction, said, "that the tunnel had been made, and the water diverted upwards of three years ago, and the right ought first to be settled at law." In the case before the court, the mill dam was built and the spring overflowed upwards of ten years before the bill was filed. Under such circumstances, we think, the complainants' right ought to be first settled at law; we therefore affirm the decree.

Decree affirmed.

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COCKE vs. TROTTER, et. al.

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Where bill and cross bill were heard together in the chancery court, but the rule docket only showed that the cross bill had been regularly set for hearing, this court will not remand the cause for such supposed irregularity.

If an answer is not responsive to some charge or interrogatory in the bill, and the answer is replied to, facts alleged in it, by way of avoidance, must be proved.

Where a bill of sale is made to a minor or infant of tender years, living with his father, which purports to be for a valuable consideration, the court cannot merely from the fact of infancy, infer that the consideration was paid by the infant's father.

The presumption of law is, that the consideration stated in a deed or bill of sale passes, as the deed imports, from the vendee to the vendor.

A bill of sale, not registered or proved, is notwithstanding valid between the parties, it would only be void as to creditors and purchasers.

Where an administrator takes the property of a third person into possession, claiming it as part of his intestate's property, he thereby becomes personally responsible to the owner.

Where a bill was filed to enjoin the sale of slaves, and have them delivered to complainant, but the injunction was dissolved and the slaves were sold: Held, that a decree for the value of the slaves was not, under such circumstances, erroneous.

Interest on the hire of slaves due at the end of each year, calculating it on each item, down to the taking of the account, should be allowed; but it is erroneous to compound it, by adding the interest to the principal at the end of every year.

All the material facts of this case are stated in the opinion of the court.

J. Campbell and Boyd, for complainant.

T. Washington and A. M. Clayton, for defendants.

REESE, J. delivered the opinion of the court.

1st. A preliminary question to be considered is, whether this cause consisting of bill and cross bill, was so brought to hearing before the chancellor, as that by the rules and course of a court of chancery, he could pass upon the merits and determine the rights of the parties, or whether such irregularity took place, as that this court, upon the appeal, cannot hear the cause, but must remand it to the chancery court? The defendant in the original bill so insists, and he grounds

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himself upon the following state of the case. After the re-
applications were filed to the defendants answers to the original
and amended bill, and after the dissolution of the injunc-
tion, the court, in May, 1832, "ordered that the cause be
set for final hearing at the next term of the court," and after-
wards in October, 1834, the court ordered that the cause
be remanded to the rules, with leave to file a cross bill for the
benefit of the creditors of Stephen Cocke, deceased. What
has been called by the parties on both sides, and by the chan-
cery court, a cross bill, was filed against the complainant in
the names of the defendants in the original bill, and one Ste-
phen Cocke, jun. by his guardian, claiming to be a creditor
of the estate of Stephen Cocke, deceased. As to this cross
bill, at June rules, 1836, it is entered on the rule docket,
"set for hearing *ex parte* for want of answers," and at the
ensuing term of the chancery court, the causes were tried
together in the presence of counsel on both sides, and no
objection appears to have been made. It is now said, that
the original cause ought to have been again set for hearing,
and no entry on the rule docket to that effect appears. To
this we answer, first, that in the situation in which the cause
stood, it was competent for either party to have set it for
hearing on the first day of the term; it was competent for
them to have heard it by consent, without entry on the rule
docket. Again, no proof, in the lapse of four years, was
taken by either party, and the case could not have been
opened for taking testimony by either side, without very
strong and special ground laid by affidavit; no such applica-
tion was made; no injury, therefore, to the rights of either
party was done by hearing it as it stood. 2d. The cause con-
sidered by both parties and by the chancery court, as a cross
bill, was set for hearing by the complainant in that bill for the
want of an answer. A cross bill incorporates itself with the
original bill, and must be heard with it. When, therefore,
the complainants in the cross bill set it down for hearing, they
did an act, the legal effect of which perhaps was to set down
the principal cause also. This consequence certainly resulted
so far as consent was necessary to it. In conclusion we
will say, that this point has received more attention from

the counsel and the court than its importance merits. It is to be hoped this attention, on similar grounds, will not often be exacted. If the cause were remanded, it would be in order that an entry might be made on the rule docket. The attitude of the cause and the rights of the parties would not be changed by it. Very different was the case of *Lowry vs. McGhee*, 5 Yer. Rep. 238, where the defendants, without a rule for replication, set the cause for hearing on bill and answer, making thereby their entire answer testimony in the case.

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2. The bill alleges that on 16th January, 1816, the complainant purchased a negro woman from one Charles Miles, for the consideration of \$300, and took a bill of sale, which is annexed to the bill; that he took her to the house of his father, where he then resided, and continued to reside till 1829, the time of his father's death. That during that time she had a male child, Daniel. That his father never pretended to set up the least claim to the negroes, and that the defendant, as administrator of his father's estate, was about to sell them, and an injunction was prayed. An injunction to restrain the sale was issued. The defendant answers, that the intestate in 1807 purchased the negro woman from James W. Cocke, and exhibits the bill of sale.

The defendant states in his answer that he is informed and believes the fact to be so, that Miles, under whose bill of sale complainant claims, became possessed of the negro by virtue of some contract with his intestate, and afterwards made the bill of sale to the complainant, then an infant, at the request of said Stephen Cocke, who paid to the said Miles all the consideration which was advanced for said bill of sale. That complainant was then an infant, and could not have by any means paid the consideration. That the bill of sale was in effect a voluntary conveyance from said Stephen to complainant, and that the said Stephen only intended to give him the negro and her increase, if not necessary to pay debts; that intestate, in his life time, exercised exclusive ownership over the negroes, and in April, 1832, mortgaged the negro woman, to secure a debt of his, and a deed of mortgage is exhibited with the answer, in which one of the

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negroes mentioned, is of the same name with that in dispute. The answer also states, that the bill of sale from Miles to complainant has not been registered, and that in the neighborhood the intestate was regarded as the owner of the negroes and obtained credit on that ground. That intestate, on 17th January, 1816, before the date of the bill of sale to complainant, as the answer expressly alleges, became executor of — Cocke, deceased, and that since his death judgment has been obtained against respondent, for his default as executor. That the bill of sale to complainant, he is advised, is fraudulent against creditors, and that he was about to sell said negroes when enjoined. This answer is replied to, and no proof whatever is taken in the case, nor other proceeding materially varying the rights of the parties, as shown in this bill and answer. In this state of the case, what are the legal consequences necessarily resulting? 1st. The answer admits the bill of sale from Miles to the complainant, exhibited with the bill, states that Miles by contract with Stephen Cocke, was possessed of the negro, and conveyed her to the complainant, states that defendant being an infant, had no means to purchase, and alleges that the consideration was advanced by Stephen Cocke to Miles, and was intended as a gift, if not necessary to pay debts. Now this allegation of the consideration having been paid by Stephen Cocke, is not responsive to any charge or interrogatory in the bill, and the answer being replied to, and there being no proof in the cause, the court are not permitted to infer the fact from the tender years of the complainant, who, notwithstanding that, might have had ample means. The presumption is, that the consideration passes, as the deed imports, from the vendee to the vendor. There is nothing shown to prove the contrary. If then, as must be presumed, the consideration was paid by the complainant to Miles, who, as the answer states, was possessed of the negroes by contract with Stephen Cocke, all other questions in the case are at an end, as the complainant has a deed from Miles, which although unregistered is valid, there being no creditors of Miles objecting thereto. This view is decisive of the whole case, and as it presents itself *in limine* and cannot be obviated, it is useless

and perhaps hardly proper to determine other points which have been discussed with much ability. Some of these points would bring us to the same result. As to the remedy given by the chancellor, it is objected, 1st, that the decree is rendered against him personally, although he is sued as administrator. He is called administrator indeed in the bill, because he assumed by virtue of that character, without legitimate power derived from his office, to inflict a wrong upon the property of complainant, by selling and disposing of it. The bill states the facts upon which his liability arises; they make him personally responsible. 2d. It is objected that the bill was filed to recover the negroes specifically, and the decree is for their value, hire, &c. The complainant is now entitled to have the negroes specifically delivered to him, and if the defendant can do so he certainly may. But the cross bill, filed by defendant in 1834, states, that before that time he had sold the negroes, and therefore, if the complainant is willing to accept their value, defendant cannot object. The actual delivery of the negroes cannot be imposed upon the defendant under the circumstances, as the court dissolved the injunction and permitted a sale. 3d. It is said, annual rests, as to the hire is decreed, and that this is harsh and unusual. We suppose that nothing more is meant by the decree than to ascertain the hire of each year, and for the sum due for hire at the end of each year, to give interest to the time of taking the account. This is proper. If it be intended to compound the interest at the end of each year, by adding it to the principal, we do not agree to such course, and would reform the decree in that respect, but we put the first named construction upon the decree.

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Decree affirmed.

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BLAKE vs. HINKLE *et al.*

Blake

▼

Hinkle

It is the duty of a party before he sues the stockholders of the Fayetteville Bank, to obtain a judgment at law, if he can, against the bank, and ascertain by the issuance and return of an execution that there was no corporate property out of which his judgment could be satisfied.

A bill against the stockholders of the bank to subject them to individual responsibility, must aver and state facts from which it will appear that no judgment could have been obtained against the bank.

The bill stated, "that complainant was informed and believed that the business of the bank had been so fraudulently and negligently conducted, that no suit at law could be commenced against it, as the stockholders had failed and refused to elect directors, as they were required to do by the charter, and done many other acts contrary to the charter, whereby the corporation is dissolved, and by reason thereof no legal process can be served upon said corporation or its officers, if any there be in existence." The bill also avers, "that if a judgment could be had it would afford no relief, as there was no visible effects of said bank whereon to levy an execution:" Held, that these averments were insufficient to authorize a suit against the stockholders individually.

The failure to elect officers or directors of a bank, does not produce a dissolution of the corporation.

On the 27th of February, 1834, a bill was filed by William C. Blake against Joseph Hinkle, William Moore, Elliott H. Hickman, Charles McKinney and William Edmonson, in which it is stated that Blake is the owner of Fayetteville Tennessee bank notes, to the amount of \$650, that the business of said bank has been so negligently and fraudulently managed, that no suit at law can be brought against it, as the stockholders have failed and refused to elect directors as required by the charter, and many other acts and doings have taken place contrary to the charter, whereby they are dissolved. For the reasons above set forth, no legal process can be served upon said corporation or its officers, and if judgment could be recovered at law; nothing could be obtained. The bill refers to the charter of the bank and the requisitions thereof. It avers that the defendants are five of the stockholders of said bank, that the stock was not paid in, but stock notes given therefor, which were renewed payable in Fayetteville bank notes, and that afterwards, in 1820, the directors passed an order, that debtors to the bank might transfer their stock in payment, and that defendants did so, and no fund was created for payment

of the notes of the bank; that the endorsers upon notes due to the bank have by the negligence and mismanagement of the directors been discharged, and that the bank issued the above notes in 1818. The bill prays that defendants may be decreed to pay complainant the amount due him by the bank, with interest, &c. To this bill there is a demurrer which was sustained by the circuit court.

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J. Campbell, for complainant, contended, 1st. that the capital stock of the bank was to be regarded as held in trust for the payment of the corporate debts. *Wood vs. Dummer*, 3 Mason's Rep. 308. That in this case the defendants were guilty of fraud and combination with the directors, upon which ground alone the bill could be sustained.

2d. That the facts stated in the bill, and admitted by the demurrer, showed that the corporation was dissolved, and no suit could be instituted against it as a body politic, and that in such case a bill would lie against the stockholders. *Wood vs. Dummer*, 3 Mason's Rep. 408: *Vose vs. Grant*, 15 Mass. Rep. 505.

F. B. Fogg, for defendant. The Fayetteville bank was chartered by the act of 1815, c 199; amended by act of 1817, c 146, § 31, 2 Scott's Revisal, 287, and 415. The charter does not expire until the 1st of January, 1841. See § 33 of 1817, c 146. By the second section of the charter act of 1815, c 199, the directors chosen, hold their seats until others are elected. The forfeiture of the charter has never been judicially declared, and the corporation is a necessary party. See *Robinson vs. Smith*, 3 Paige's Ch. Rep. 222: *Wood vs. Dummer*, 3 Mason's Rep. 308: Angel and Ames on Corporations, 510.

2d. By the act of 1821, c 197, see acts of that year, p 186, a legal remedy is provided against the bank and its funds, by service of process upon the late president, cashier or any director, and demand of payment is to be made of such person or persons. This bill does not allege any presentation of the notes to the cashier, or at the banking house, or to any other person, and gives no excuse why he has not brought suit for more than fourteen years. This court as a court of equity

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there is a plain remedy at law.

3d. By the 17th and 18th article of the charter, the directors are made personally responsible at law, and there is no allegation that the corporation, as such, have refused to proceed against them.

4th. A court of equity has no jurisdiction during the existence of a charter to enquire as to its forfeiture, or to proceed against individual stockholders. *Attorney General vs. Ulica Insurance Company*, 2 John. Ch. Rep. 371: also Hopkin's Ch. Rep. 354, do. 598. It has jurisdiction to proceed against directors for a fraudulent breach of trust, and make them individually responsible. 2 Paige's Rep. p. 438.

5th. The statute of limitations is a good bar in this suit. *Kinsdale vs. Larned*, 16 Mass. 65.

REESE, J. delivered the opinion of the court.

Various reasons have been urged in argument, why the decree of the circuit court for Lincoln county, which sustained the demurrer filed by the defendants and dismissed the bill, should be affirmed in this court. We deem it unnecessary to consider and decide upon all the grounds. We are of opinion, that the bill does not sufficiently aver and show that complainant could not have obtained a judgment at law against the bank. If he could, he ought to have done so, and by the issuance and return of an execution thereon, have ascertained that there was no corporate property out of which his judgment could be satisfied, before in this court, he sought upon the grounds stated in the bill, to render the stockholders sued individually responsible. The bill upon this point states, that the complainant has been informed and believes that the business of said Fayetteville Tennessee bank, has been so negligently and fraudulently managed and conducted, that no suit at law can be commenced against it, as the stockholders of said bank have failed and refused to elect directors of said bank, as they were required to do by the charter, and done many other acts contrary to the charter, whereby they are dissolved for the reasons above set forth; by reason thereof, no legal process can be served upon said corporation, or its officers, if any

there be in existence. And the complainant adds, "that if a judgment could be obtained at law it would not afford relief, as there are no visible effects of the said Fayetteville bank whereon to levy an execution."

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By the charter of the bank granted in 1815, the existence of the corporation will continue till the year 1841. No dissolution is alleged in the bill, as the result of judicial or legislative action, but the corporation is stated to have been dissolved by the non-election of officers and other acts inconsistent with the charter. The failure to elect directors or other officers, could not produce a dissolution of the corporation, nor could it prevent the institution of an action at law. For it is provided, with regard to this bank, by the act of 1821, c 197, § 5, that in such event, demand shall be made and process served upon the late president, cashier, or any director.

There is no averment in the bill that none of those persons who had so been officers or directors of the bank exists within the reach of process from a court of common law, but the statement is, that the failure and neglect to elect directors prevents the obtainment of a judgment at law.

Upon this ground, then, we sustain the demurrer to the bill and affirm the decree of the circuit court.

Decree affirmed.

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HAMRICO vs. LAIRD *et al.*

Hamrico
v
Laird

A husband having administered on his deceased wife's estate, after payment of her debts is entitled as husband, in his own right, and in exclusion of her next of kin, to all her personal property.

But where the husband by an ante nuptial contract relinquishes and releases all claim by virtue of his marital rights, to the separate estate of his wife, the next of kin of the wife will be entitled to it.

Where, by an ante nuptial contract, certain property belonging to the intended wife was settled to her separate use, and it was also stipulated "in order that it may fully appear that the money or property purchased by the same is to remain hers, (the intended wife's,) and the said John Hamrico, (the intended husband,) agrees and binds himself, his heirs, &c. to relinquish all claim he has or ever could have to the property so purchased, or money either in law or equity, that he might have by marrying and becoming the husband &c. and that she, the said Sarah Tuttle, shall have the sole disposal and management of the same, with as much right, power and authority as if a marriage had never taken place between the parties &c; Held, that this was a relinquishment of the marital rights of the husband absolutely, and not merely during the coverture.

For the facts of this case see the opinion of the court.

A. Wright, for complainant.

F. B. Fogg and J. W. Combs, for defendants.

REESE, J. delivered the opinion of the court.

This is a contest between the complainant, who as administrator of his wife, and by virtue of his marital right, seeks to recover certain negroes, the separate property of his wife, from the defendant, Martin Laird, the trustee of the wife, and from one of her next of kin, who have the negroes in possession; the other defendants are also her next of kin.

1st. It can scarcely now be made a question whether the husband, having administered upon the wife's estate, is entitled to retain the separate property and choses in action of the wife after payment of the debts, without distribution among her next of kin. He is not accurately described, when called as is sometimes done, her next of kin, nor does he derive his title to claim her personal property from the statute of distributions, but he claims it, and is entitled as husband, and in right of the marriage as owner. An ingenious elementary writer, Mr. Reeves, in his *Domestic Relations*, p. 11 to 17, makes an argument to prove that the husband having been unprovi-

ded for in the statute of distributions, 22 Ch. II. c 10, his right to the exclusive enjoyment and ownership of his wife's separate property and choses in action, is founded upon the 29 Ch. II. c3, § 35, and that therefore in all those States of our union, where this section of the latter statute has not been re-enacted, the husband, if he administer, is bound to distribute the surplus to the next of kin of the wife. As neither North Carolina before our separation from her, nor Tennessee since, have re-enacted that section, the point was raised a few years since in the chancery court at Franklin, in the case of *Maury and Wife vs. Eaton, Lewis and others*, and in the chancery court at Charlotte, in the case of *Joslin, vs. Thompson*. In the former case, the point was discussed by counsel with much force and ability, and the chancellor determined the question against the claim of the next of kin, and against the argument in Reeves' Domestic Relations. As the decision in each of those cases, was acquiesced in by the parties and by the profession, and that the question may not again be raised and discussed, we deem it not improper to say that we think the point was correctly determined in those cases. The husband, therefore, in this case, would be entitled upon his general right to recover the possession of the property in controversy, unless that right be destroyed by something existing in the cause.

NASHVILLE,
December 1836.

Hamrico
v
Laird

2d. The negroes in dispute were during the coverture, purchased by the separate funds of the wife, and by her direction conveyed to Martin Laird, the defendant, and to his heirs &c., "upon condition that he is to suffer and permit Sarah Hamrico, wife of John Hamrico, to keep possession of, and enjoy to her own separate use and benefit the said negro woman and her increase, free from the control or disposal of her said husband, or any other person, and if the said Sarah should at any time hereafter desire to sell or otherwise dispose of said negro or her increase, the said trustee is hereby bound to convey and dispose of said negro or her increase, according to the wish and instructions of the said Sarah, and should the said Sarah wish, she is hereby authorised to dispose of said negro and increase by will, and the same shall go according to her said will after her death, and should she die intestate, then

NASHVILLE, the said negro and her increase shall go to her children if she have any, and if not, then to her brothers and sisters.”
December, 1836.

Hamrico
v
Laird,

The wife took the property into her possession and retained it till her death. She directed no sale, made no will, and died without issue. The defendants are her brothers and sisters. Can they claim the property by virtue of the above instrument? Founding their title upon that alone, it is most clear they cannot. The entire property was hers and at her absolute disposal, without control or limitation. No estate whatever vested in the defendants by operation of this deed. It were useless to cite authorities to maintain a proposition so obvious.

3d. But there was in consideration of marriage, an antenuptial contract between the husband and wife, both being of full age. That contract is as follows: “Whereas, a marriage is about to take place between John Hamrico, of the county of Giles and State of Tennessee, and Sarah Tuttle, of the said county of Giles and State aforesaid, the said John Hamrico being widower, and having several children living with him that he had by his first wife, and as Sarah Tuttle is a single woman without children, it appears right that a part of the money and debts due her should and ought to remain hers, and under her control after marriage, the same as at this time; for remedy whereof, the said John Hamrico for himself, his heirs, &c., agrees with the said Sarah Tuttle, that the said Sarah shall and may set apart and keep for her own use, and to be at her own disposal, four hundred and fifty dollars, out of any money she may have on hand at this time, or in debts owing to her, to be applied by herself or any other person she may authorise to lay the same out to purchase a negro woman and child, or said money, she may lay out in any other way it may suit her best; and in order that it may more fully appear that the money or property purchased by the same is to remain hers, the said John Hamrico agrees and binds himself, his heirs, &c., to relinquish all claim he has or ever could have to the property or money so purchased, either in law or equity, that he might acquire by marrying and becoming the husband of the said Sarah Tuttle, and that she, the said Sarah, shall have the sole disposal and management of the same, with as much

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right, power and authority as if a marriage had never taken place between the parties, or as if the said Sarah had never become the said John's wife. In witness whereof we have hereunto set our hands and seals, this 6th day of May, 1830.

NASHVILLE,
December, 1836.

Hamrico
v
Laird

JOHN HAMRICO, [Seal.]

SARAH TUTTLE, [Seal.]

Attest, Robert M. Bugg, Martin Laird."

The rights of the parties in this controversy, and the result of the cause must depend upon the construction of the above contract, as to whether it is to be held a release of the marital right of John Hamrico during the coverture only, or absolutely. That the interest of the husband by survivorship may be released will hardly be controverted. In equity a possibility may be both released and assigned. 1 P. Wm. 574: 2 Atk. 421: 5 Ves. 583: 3 P. Wm. 132: 2 Atk. 208: 1 Ves. 411. In the case of *Ladbroke and Tompkins*, 2 Ves. 592, it is decided, where the wife of a freeman (of the city of London,) is compounded with, her third accrues to the whole estate, and she is considered as dead. And in *Read vs. Hall*, 2 Atk. 644, where the wife has compounded with her husband, he is to be regarded as leaving no wife.

The language of the covenant before us is very strong. Does it look only to the coverture? There is no expression limiting it to that period. The terms during coverture or during the life of the wife, nowhere appear in it. The phrase in the recital, "that she is to hold the property after marriage as before," is not equivalent to the phrase "during coverture," it is much stronger against the husband. The recital in the commencement of the instrument, that "she is without children," and the husband has "several by a former marriage," and that therefore it seems right that a part of the property should remain hers, seems to look beyond his life, to a provision for her children, as against the husband and his children by the former marriage. And, as if to remove all doubt on the subject of his at any time putting forward a claim to the property in question, on the ground of his marital right, present, prospective or contingent, he explicitly declares, in order that it may more fully appear that the money or property purchased by the same, is to remain hers, the said "John Ham-

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December, 1836.

Hammico
v
Laird

rico agrees and binds himself, his heirs, &c. to relinquish, and does relinquish, all claim he has or ever could have to the money or property so purchased, either in law or equity, that he might acquire by marrying and becoming the husband of the said Sarah Tuttle." Language more strongly appropriate to exclude him from all title whatever to the property, by virtue of his marital right, not only during the coverture, but absolutely and for ever, could not we think have been adopted; and we are unable to perceive any thing in the balance of the instrument to limit this language to the period of coverture.

The post nuptial conveyance to the trustee of the wife, who was one of the witnesses to the contract, has much force in the view we are taking of this part of the case. We have said it has no legal efficacy *per se* in passing the title to the defendants. It is perhaps not a good appointment under the contract, but it was prepared at the instance of the wife, submitted to her inspection, and approved by her. The whole transaction in short, the conduct of the husband, and his declaration on the subject, are strong and pregnant circumstances to show in what sense the husband and wife, and the relations of the wife understood the instrument to which we have been attempting to give a construction, and they powerfully fortify that construction.

The case of *Stewart vs. Stewart*, 7 J. Ch. Rep. 248, has a good deal of analogy to this case, and the authority of it had well nigh operated on our minds to give to this case a different result from that above indicated.

In that case, the chancellor states, (p. 248,) "that the husband covenanted that his wife during coverture, should have to her own use all the personal property belonging to her at her marriage, or which might come to her during coverture, by devise or otherwise, and that she might convey away the same according to the forms of law, by testament or otherwise; and that during coverture she should enjoy the right of dower in the estate of her former husband, and the rents and profits of any real estate to which she might be entitled, as fully as if she had remained sole, he thereby releasing all his marital rights in and over the same, and covenanting to make other assurances, &c." The chancellor says that the words at the latter

end of the covenant, releasing all his marital rights in and over the same, refer to the immediate antecedent provision relative to the rents and profits of her real estate, according to the maxim, *idem semper antecedenti proximo refertur*. And if the release was to be construed to apply to every part of the covenant, it could have no greater operation and effect than the provisions in the covenant, and ought to be construed to be only a release of his marital rights during the coverture." This extract from the covenant and the commentary of the chancellor thereon, show the difference between that case and the one before the court. Indeed that case proves that if his marital rights had been clearly and absolutely released, effect would have been given to it, although the children as next of kin were not mentioned in the release or the covenant. Our conclusion therefore, in this case is, that by the ante nuptial covenant the husband did absolutely and entirely release his marital rights, and therefore that the next of kin of the wife, the defendants, are entitled to the property in controversy.

NASHVILLE,
December, 1836.

MANRICO

▼
Laird

But finally, it has been urged for the complainant, that let the right be as it may, he has administered upon the estate of the wife, and in his character of administrator is entitled to recover these negroes as assets for the payment of debts; and for this we are referred to the case of *McKay vs. Allen and others*, 6 Yer. Rep. 44. In that case debts against the separate estate of the wife were alleged and proved. Here they are neither alleged nor proved. Here also, three years have elapsed since administration granted, and the administration should have closed, and the distributees would be entitled if the negroes were surrendered, to have them immediately returned to them.

In truth the complainant, although he states himself as the administrator, yet he sues upon his title as husband and owner of the property. The existence of a debt is not intimated, and the marriage contract itself and the other proof in the cause, make the existence of any debt highly improbable. Let the decree of the chancellor be affirmed.

Decree affirmed.

NASHVILLE,
December, 1836.

WALKER, *et. al.* vs. McCONNICO, *et. al.*

Walker
v
McConico

A promissory note, executed without consideration, and with a view to protect the maker's property from his creditors, cannot be enforced against the maker by the payee.

Where an instrument of writing is called a note, in a deed of trust, the court can not infer it was a sealed instrument.

On the 1st of September, 1832, the defendant, Lemuel B. McConnico executed to defendant, Samuel Cox, a deed of trust, by which he conveyed to him Lot No. 173, in the town of Franklin, five negroes, and other personal property, for the purpose of securing and paying his debts, which he divided into three classes, the first class being one note due to D. P. Perkins, for five hundred dollars; in the second class were two notes, due to Cooper, Caruthers, & Co. for four hundred and ninety-eight dollars each. In the third class was a note for two thousand dollars, payable to Garner McConnico.

The latter note was without consideration, and was made with a view to protect the surplus of the property in the hands of the trustee, after paying the debts mentioned in the first and second classes. The chancellor decreed, that after payment of the debts in the first and second class mentioned, out of the proceeds of the trust property, the surplus, if any, should be applied to the extinguishment of the \$2000 note. He also decreed that the balance of the said debt of \$2000, should be paid by the defendant. From this decree the defendant appealed.

J. Campbell, for complainants.

Geo. S. Yerger, for defendants.

GREEN, J., delivered the opinion of the court.

In this case it is not questioned, but that the decree of the chancellor in regard to the trust property, is correct; but it is insisted, and we think with reason, that the decree against the defendant McConico, as to the two thousand dollar note is erroneous. The answer in reply to the interrogatories of

the bill, states, that said note was executed without consideration, and its existence was mentioned in the deed of trust with a view to protect his property from the creditors of the firm, of which he was a member; but that becoming conscious that he had done wrong, he applied to his father to deliver up the note, and that the note being lost his father gave a receipt against it. This statement of the answer is not only uncontradicted by the proof, but it is supported by the testimony of Garner Y. McConnico in every material particular. The note having been made, and the deed of trust executed to defraud creditors, the defendant cannot resist the execution of the trust according to the terms of the deed. But as the note was without consideration, and was executed to hinder and delay creditors, the promise to pay, being executory, cannot be enforced. This is admitted by the complainant, but he insists that he comes into this court only because the note is lost, or is in the hands of the defendant, and that this court will only notice such defence as the defendant could have made, had he been sued at law. Conceding the correctness of this position, it would be incumbent on the complainant to show that the note, as it is called, was under seal; for otherwise a recovery might have been resisted at law as well as in equity. This he has not done. It is called throughout the bill, deed of trust, answer and proof, a note, which means a written promise, not under seal, to pay money. The evidence also shows that the note was given up to the defendant, by his father, or a receipt executed against it. The debt was thereby extinguished as to the payee, or those claiming under him, unless its collection were necessary, in order to the payment of the debts of complainant's intestate. But that it is so necessary, is not shown by the bill, or any part of the case. We think, therefore, that no decree should be given against the defendant McConnico personally for the said \$2,000, and that the decree of the chancellor, in that particular is erroneous and should be reversed.

NASHVILLE,
December, 1836

Walker
v
McConnico

Decree reversed.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

JACKSON, APRIL TERM, 1837.

WALKER vs. GRAHAM.

JACKSON,
April, 1837.

Where a *ca. sa.* had issued and a bond in pursuance of the act of 1824, was executed by the defendant, conditioned to appear at the county court, and surrender his property or take the insolvent debtors oath, or pay the debt; and neither of these things were done in the county court: Held, that the bond was forfeited, and they could not be performed afterwards upon an appeal to the circuit court.

Walker
v
Graham

For the facts of the case see the opinion.

J. Haskell, for complainant.

A. B. Bradford, for defendant.

GREEN, J., delivered the opinion of the court.

The record in this case shows, that a *ca. sa.*, issued at the suit of *Walker vs. Graham*, who executed a bond with Stephen Murphy and William B. Walker, his securities, conditioned to appear at the county court of Perry county, on the 3d Monday of July, 1835, to make payment of the money called for in the *ca. sa.*, or take the insolvent debtors oath, or surrender his property as prescribed by law.

At the July term of the court, a judgment was rendered

JACKSON.
April, 1836.

Walker
v
Graham

against the defendant and his securities, for the amount of the debt. The judgment recites, that Walker appeared in court and presented a schedule of property, and prayed to be discharged; but the court not deeming the schedule a sufficient cause of release, and the defendant refusing to pay the debt or take the oath prescribed for insolvent debtors; judgment was rendered against him on the bond. From this judgment an appeal was taken to the circuit court.

In the circuit court another schedule was presented to the court, sworn to, as the law directs, and the defendant moved to be discharged, which was refused by the court, and the county court judgment was affirmed. From this judgment an appeal is taken to this court.

The first question is, whether the circuit court was right in refusing to receive the schedule and surrender of the defendant's property, and discharge him from the obligations created by the bond.

The condition of the bond was, that the defendant would appear at the July term of the county court, in 1835, and surrender his property, take the oath of insolvency, or pay the debt. It is clear, that if he did neither of these things at that time, he forfeited his right to a discharge, and the bond became absolute.

The appeal to the circuit court could only operate in the nature of a writ of error, and the circuit court, could hear no new fact, but must act upon the facts which were before the county court as contained in the record. If that court had improperly refused to discharge the party, the judgment should have been reversed, and such judgment given as should have been rendered by the county court. But if the party had failed to perform the condition of the bond, at the time specified in it for the performance, he could not be permitted to perform it afterwards, either in the county or circuit court.

The next question is, whether the county court erred in its judgment. The facts upon which the county court acted are not made part of the record by a bill of exceptions. It was indispensable that this should have been done, in order that we may consider of them. We can act upon the record only, and nothing is part of the record but the pleadings, the

orders of court, and the bill of exceptions. The clerk has copied what purports to be a schedule presented by Walker to the county court, and a deed to Walker's children. But as we cannot consider these papers as part of the record, there is nothing to show that the judgment of the county court is erroneous. The circuit court judgment, affirming the judgment of the county court, was therefore correct, and must be affirmed.

JACKSON,
April, 1837.

Earl
v
Rice & Crenson

Judgment affirmed.

EARL vs. RICE AND CRENSON.

Two justices of the peace may, by the provisions of the act of 1833, c 65, grant a *certiorari* to remove the proceedings in a writ of forcible entry and detainer, into the circuit court.

This was a proceeding before justices of the peace, for a forcible entry and detainer. After judgment had been rendered, a *certiorari* to remove the judgment and proceedings into the circuit court was granted by two justices of the peace, returnable to that court. A motion was made to dismiss the *certiorari*, upon the ground that two justices had no authority to grant it, and that consequently the circuit court had no jurisdiction of the case. The motion was overruled, judgment rendered, and an appeal in the nature of a writ of error prosecuted to this court.

TURLEY, J. delivered the opinion of the court.

The only question presented in this case is, whether under the provisions of the act of 1833, c 65, § 2, two justices may grant writs of *certiorari* and *supersedeas* to remove the proceedings in a writ of forcible entry and detainer into the circuit court. The act provides, that two justices may grant a *certiorari* and *supersedeas* to remove the judgment and proceedings of justices of the peace, returnable to the circuit court of their county, subject to the same rules as now regulate *certiorari*'s as granted by a circuit court. The question

JACKSON,
May, 1837.

Anderson
v
Williams

then is, is a writ of forcible entry and detainer, and a judgment thereon, the judgment and proceedings of justices of the peace. We think they are. By the provisions of the act of 1821, c 14, regulating the mode of proceeding by writ of forcible entry and detainer, jurisdiction in such cases is expressly and exclusively given to justices of the peace, and their judgment can only be revised in the circuit court by a writ of *certiorari*. The case is within the express words of the act of 1833, c 65, § 2, and however we may regret, that such a power has been delegated to justices of the peace, yet, as it is our duty to expound the law, and not to make it, we are constrained to enforce the provisions of the statute. Let the judgment be affirmed.

Judgment affirmed.

ANDERSON'S *lessee* vs. WILLIAMS AND OWEN.

This case involved precisely the same questions which were decided in the case of *Hamilton vs. Burem*, 3 Yer. Rep. 355. The court in this case, after stating the principle which they considered as settled, in regard to tax sales in this state, says "the only question before us is, whether it (the principle) was properly applied, in the case of *Hamilton vs. Burem*, for if so, it properly applies to this case also, which is identical." The cases being identical, in the opinion of the court, the act of 1835, c 76, prohibits a report at length of this case, which was decided in conformity with that case, and merely re-affirms the doctrine there laid down.

JACKSON,
April, 1837.

WRIGHT vs. McLEMORE AND RAY.

Wright
v
McLemore

Where an instrument is jointly executed to several, one of the joint payees or obligees, or his assignee, may sue in the name of all, without their consent.

The facts of the case necessary to be stated, will be found in the opinion of the court.

J. H. Dunlap, for plaintiff in error.

W. Fitzgerald, for defendant in error.

TURLEY, J., delivered the opinion of the court.

On the 4th day of November, 1833, Henry Wright executed his bill single for the sum of \$1000, payable to John C. McLemore and John Ray, on the 1st day of April, 1835. The bill being left in the possession of Ray, was by him transferred by delivery to Terrence Cooney, for whose use this suit is brought. On the trial in the circuit court, Henry Wright filed his affidavit, stating in substance that the consideration, or a large amount thereof, for which the bill single had been executed had failed, and that in consequence thereof, McLemore, one of the payees, had refused to permit his name to be used in the suit against him, and that Cooney had no right to use his name in connection with Ray's, to enforce the collection of the debt, and upon this affidavit asked of the court a rule to show cause why the suit should not be dismissed, or a sufficient authority be shown for its prosecution. The rule was granted, and discharged upon the production of the bill by Cooney, which was the only evidence of his right to use the names of McLemore and Ray in the suit for his benefit.

The question then is, ought the rule to have been allowed on the affidavit of the defendant? if it ought, it was error to have discharged it without other proof than the production of the bill, for this could prove nothing but the fact that he was in possession, without showing whether he was rightfully so or not. Whether the rule was properly allowed depends on the sufficiency of the affidavit filed for its support.

JACKSON,
April, 1837.

Wright
v
McLemore

In the case of *Cage vs. Foster*, 5 Yer. 261, it was held to be the correct practice, that when one used the name of another in bringing a suit for his use, without authority, the defendant might state the fact on affidavit, and have a rule to show cause why the suit should not be dismissed. If the affidavit filed by the defendant in this cause were sufficient to bring it within the operation of the case of *Cage vs. Foster*, the court erred in discharging the rule. But we do not think it is. It merely states that one of the obligees had refused to permit his name to be used for the purpose of collecting the debt, because of a failure of consideration. But the other obligee had transferred the bill by contract to Cooney, and so far as we can see he had no objection to the use of his name.

McLemore might have released his interest in the note, but he could not be heard to say that he would not permit his co-obligee to use his name in conjunction with his own, to enforce the contract, so far as he was interested therein; otherwise in all cases of contract, joint as to the payees, the obstinacy or fraud of one might defeat the remedy of the other. The principle has been, therefore, long settled, that in such cases one joint payee or obligee may use the name of the other in a suit without his consent. 1 Lord Ray. 380: 1 Sander's Rep. 153: Chitty's Plead. 9: 9 East. 471: 2 Camp. 190. If then, Ray, would have had the right to use McLemore's name without his consent, in prosecuting a writ for the recovery of the debt from Wright, a transfer of the debt by him to Cooney, also transferred the right, and McLemore could no more defeat the writ brought for Cooney's benefit, by disavowing the power to use his name, than he could if Ray had brought the suit himself.

The affidavit then is not sufficiently broad to support the rule asked for, it should have shown that Cooney had no authority to use the name of either McLemore or Ray, and not having done so, the rule ought not to have been granted.

Judgment affirmed.

CRUTCHFIELD *vs*, STEWART'S *Lessee*.JACKSON,
April, 1837.Crutchfield
v
Stewart

A power of attorney was proved as follows: State of Tennessee, Henry county, March term, 1824, the within power of attorney from Robert E. C. Doherty to Samuel McCorkle was acknowledged in open court, by the subscriber thereto, and ordered to be certified for registration." Held, that this was an insufficient probate.

Where a *scire facias* was issued to subject real estate descended to minor heirs, to the payment of their ancestor's debts, personal service thereof, as well upon the heirs themselves, as upon their guardians, is necessary.

The facts upon which the court predicated its judgment are stated in the opinion.

A. McCampbell, for plaintiff in error.

J. Dunlap, for defendant in error.

REESE J. delivered the opinion of the court.

The principal error in the proceedings of the circuit court alleged on the part of the defendant below, the plaintiff here, is, that the court permitted the power of attorney from Robert E. C. Doherty to Samuel McCorkle, to be read to the jury upon the following certificate of the probate court:

"State of Tennessee, Henry county court, March term, 1824,—The within power of attorney from Robert E. C. Doherty to Samuel McCorkle, was acknowledged in open court by the subscriber thereto, and ordered to be certified for registration. JAS. HEETS, Clk."

This probate is defective.

1st. Although the parties are named, yet there is no description, general or specific, of the subject matter upon which the power was to operate. See 9 Yer. Rep. 41, *Yerger vs. Young*.

2d. The terms, "subscriber thereto," have not any legal or technical meaning, and in common parlance would apply as well to the attesting witnesses, as to the maker of the instrument.

For these causes the certificate of probate was clearly defective, and the power of attorney should not have been read to the jury. The judgment must therefore be reversed, and the cause be remanded to the circuit court and a new trial be had.

JACKSON,
April, 1837.

Crutchfield
vs.
Stewart

As, however, the bill of exception raises a question upon the titles of the defendant below, it is not improper, with a view to the future action of the circuit court, that we should likewise consider that question. It is, whether there must be personal service of the *scire facias* issued against minor heirs or devisees, with a view to subject the real estate descended or devised to them, to the satisfaction of the debt of their ancestor, or testator, as well upon the heirs themselves, as upon their guardians, regular or *ad litem*? This question we answer in the affirmative. The second section of the act of 1784, c 11, requires, in general terms, and without reference to full age or non-age, that heirs or devisees shall be served with process. The third section provides, that when a minor shall have a guardian, the *scire facias* shall be served on such guardian. But what does this import? that the service required by the preceding section, shall not be made upon the heir himself, also? this should not be inferred or intended, unless the inference were necessary and unavoidable. We think the service upon the guardian is *cumulative*; he must have notice of the *scire facias*, and so must the minor heir or devisee likewise.

In many instances, the heir, though a minor, may be as competent as his guardian, and much more disposed to look into his rights and guard his real estate.

To this conclusion, the construction of the act of 1784, c 11, would, upon principle, bring us; but the question has in the same manner, been settled by authority. (See the case of *Young vs. Combs*, 4 Yer. Rep. 218.) We think, therefore, the court did not err in rejecting, and refusing to permit to be read as evidence, the judgment upon the *scire facias* against the heirs.

Judgment reversed

MEDARIS *vs.* THE STATE.JACKSON,
April, 1837.Medaris
v
The State.

Where a prosecutor is not marked on the back of an indictment, as required by the act of 1801, c 30, the omission need not be pleaded in abatement, but may be taken advantage of at any time.

In this case an indictment was found against the plaintiff in error for larceny. On the back of the indictment was endorsed, "Indictment, John P. Thomas," under which was drawn a black line, and then was endorsed, the name of John P. Thomas, and others, witnesses sworn and sent to the grand jury. Upon the defendant being arraigned upon the bill of indictment, and before he pleaded thereto, he moved the court to quash it, because there was no prosecutor marked thereon, which motion was refused by the court, whereupon the defendant pleaded not guilty, was tried and convicted, and sentenced to three years imprisonment in the penitentiary; from which judgment he appealed to this court.

J. Haskell, for plaintiff in error.

Geo. S. Yerger, Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

By the act of 1801, c 30, § 1, it is enacted, that no bill of indictment shall be preferred to any grand jury in the state, without a prosecutor marked thereon.

By the second section it is enacted, that if a bill of indictment be preferred, contrary to the provisions of this act, the party so indicted may give the act in evidence, and the court shall order him to be discharged.

In the first place, it is insisted by the attorney general, that in this case there was a prosecutor marked on this indictment. The name of John P. Thomas is written upon it twice, and where it first appears, it is said to be in the place, on the back of the indictment, where the name of the prosecutor is usually marked, and is separated from the names of the witnesses who were sent to the grand jury by a black mark, and hence it is inferred, that his name was there indorsed as prosecutor. This conjecture is probably true, but

JACKSON,
April, 1837.

Medaris
v
The State

whatever we might, as individuals, suppose was the purpose of the solicitor in indorsing this name, we cannot in our judicial character assume it to be the fact. It is not said on the indictment, that his name is put there as prosecutor, and we cannot infer, from the instance of a name without any memorandum showing the purpose for which it was written, that it was thus marked as prosecutor.

2. But it is insisted by the attorney general, that this matter should have been pleaded in abatement, and if that be not done, it cannot be taken advantage of.

We are of opinion no plea in abatement was necessary, nor in fact could it have been pleaded. Here is the entire commission of a matter, which the statute declares to be essential to the validity of the indictment, and it may be taken advantage of at any time. But here the motion was made at the earliest possible time the matter could have been brought before the court. It would have been enough to produce the act in evidence to the court, and move to discharge the prisoner; but the motion to quash the indictment was perfectly formal, and was in effect the same thing.

It is said this construction of the act will be mischievous. If this be so, the legislature should alter the law, so as to limit the right of the defendant to take this objection at the first term. This court cannot change it, for the act is plain and unambiguous, and it is our duty to enforce it. Reverse the judgment.

Judgment reversed.

M'LAIN vs. THE STATE.

JACKSON,
April, 1837.M'Lain
v
The State

Where a part of jury in a capital case, the trial of which lasted several days, frequently separated themselves at night from their fellow jurors, for fifteen or twenty minutes at a time, without being under the charge of an officer; it was held that this was such an irregularity as vitiated the verdict.

Where there is an unauthorized separation of a jury for fifteen or twenty minutes, it is not necessary for the prisoner to prove that they were during their absence tampered with; it is sufficient if they might have been

For the facts of this case, see the opinion of the court.

W. Fitzgerald and J. Dunlap, for plaintiff in error.

Geo. S. Yerger, Attorney General, for the State.

TURLEY, J. delivered the opinion of the court:

At the October term, 1836, of the circuit court of Weakley county, George M'Lain was convicted of the crime of murder in the first degree. During the progress of the trial, several bills of exceptions were filed for irregularity in conducting the same, and after the verdict had been returned, a motion was made for a new trial founded on the affidavits of John Clayton, one of the jurors, and Martin B. Brim. The affidavits of Clayton and Brim, show that after the jury were sworn and during the continuance of the trial which lasted several days, a part of the jury did very frequently of a night, after they had retired from the court, absent themselves from the balance of the jury without being under the charge of an officer, and remain absent for the space of fifteen or twenty minutes.

The principal question in this case is, whether the court below erred in refusing to grant a new trial for the causes set forth in these affidavits. We think it did. The right of trial by jury, has always in England and in this country, been considered of such vital importance to the security of the life, liberty and property of the citizen, that great care has been taken to preserve it unimpaired. That the person accused may have the full benefit of a judgment by his peers, it is absolutely necessary that the minds of the jurors should not have prejudged his case, that no impression should be made to op-

JACKSON.
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v
The State

erate on them, except what is derived from the testimony given in court, and that they should continue impartial and unbiased. These objects can only be obtained by selecting those who have no preconceived opinion as to the guilt or innocence of the prisoner, and by not permitting them to separate from each other after they have been sworn, and mingle with the balance of the community. This was directed to be done in the case now under consideration, but was not complied with. The affidavits, which are uncontradicted, show conclusively, that several of the jury repeatedly separated from the others, without the care of the officer appointed by the court to attend them, and were absent for the space of fifteen or twenty minutes; long enough to have been tampered with if there had been any disposition to do so. It is not necessary for the prisoner to prove that they were during their absence subjected to improper influence from others, it is sufficient if they might have been. There would be no safety in a different rule of practice, for it would be almost impossible ever to bring direct proof of the fact that it was done.

This question has been fully examined by the general court of the State of Virginia, in the case of *The Commonwealth vs. John M'Call*, 1 Va. Ca. 271. In that case the separation of the jury was not under more exceptionable circumstances, nor for a longer time than in this; neither was there proof of any actual tampering or conversation on the subject of the trial with the jurymen. The court held that it was not necessary that this should be proven in order that the verdict should be set aside and a new trial granted. This decision is, we think, supported by English authority. 1 Chitty's Criminal Law, 634.

The case of *The State vs. Merrill Miller*, determined by the supreme court of North Carolina at the June term, 1836, is referred to by the attorney general as contradictory to this proposition. In that case the jury had been permitted to retire under the custody of the sheriff. In a few minutes afterwards the sheriff returned with eleven of the jurors only, but the other juror returned in less than two minutes, and when the judge expressed his strong disapprobation of his conduct, excused himself by stating that he was obliged to step aside to obey the calls of nature. This was insisted upon as a cause

for a new trial, which was refused by the court below. On an appeal to the supreme court, it was held by Ruffin, C. J. and Daniel J. to be a reason for applying to the discretion of the judge in the court below for a new trial, and not to render the verdict a nullity and a *venire de novo* proper. But Gaston J. dissented, and held that minor irregularities are grounds for new trials addressed to the discretion of the judge who presided at the trial, but that any unauthorised or unexplained separation of a juror from his fellows, in a capital case, in law vitiates the verdict, and a *venire facias de novo* should be awarded.

JACKSON,
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It is to be observed of this case, that under the circumstances in which the juror separated from his fellows, and the short period of time, (viz: two minutes,) which he remained absent from them, it was almost impossible that any undue influence could have been made to operate on him, and that therefore, this case stood very nearly as if there had been direct and positive proof that the Juror during his absence had seen or conversed with no person whatever. Chief Justice Ruffin, in his opinion says: "I cannot think that an absence of a juror for two minutes from the body of the jury, without communicating with any person, as far as appears upon this or any other subject, does by itself annul the finding." If the absence had been for a period of time sufficiently long to have enabled persons to tamper with the juror, or to operate on his hopes or fears, would the judge have said the same thing? we apprehend not, for stress is laid upon the time, "two minutes."

But if the decision is to be considered as sustaining the proposition as broadly as has been contended for, to wit: that no unauthorised separation of a jury during the progress of the trial, will vitiate the verdict, unless there be proof of tampering with the jury, we cannot recognise the authority of the case, especially as it is much weakened by the dissenting opinion of that able lawyer judge Gaston.

There are several other questions presented by this record which we consider unnecessary to examine, as the points already considered are decisive of the case. The judgment will be reversed and the cause remanded to Weakley county for a new trial.

Judgment reversed.

Miller v. Van A.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

KNOXVILLE, JUNE TERM, 1837.

MILLER vs. McCLAIN.

KNOXVILLE,
June, 1837.

A plea that the defendant tendered iron, &c. must aver, "that he has always since the tender been ready to deliver the same," or it is bad.

Miller
v
McLain

A note for one hundred dollars, which may be discharged by 2000 lbs. of iron by a given day, becomes a money contract if the iron is not paid or legally tendered on or before the day stipulated.

A was indebted to B by note for \$100, which might be discharged in iron by a given day. The iron was not delivered by the time specified. After which period A was garnisheed as the debtor of B, and stated on his garnishment that he owed B 2000 lbs. of iron, which was condemned and sold: Held, that this did not discharge A from his liability to B, as the money and not the iron was due to B.

All the material facts of this case are stated in the opinion of the court.

J. A. McKinney, for plaintiff.

R. J. McKinney, for defendant.

GREEN, J. delivered the opinion of the court.

This action is brought on the following instrument: "On or before the first day of March, eighteen hundred and thirty-three, value received, I will pay Thomas McLain one

KNOXVILLE, hundred dollars, which may be discharged by the payment of
June, 1837.

Miller
v
McLain

two thousand pounds of good merchantable iron, delivered at the residence of the said John Miller, in Campbell county, Tennessee. Witness my hand and seal the 21st October, 1833. JOHN MILLER, SEAL."

The defendant pleaded, 1st. Covenants performed. 2d. Tender of the iron on the day, but no one was there to receive it; and 3d. That before the writing obligatory became due, the plaintiff assigned it to Spencer Doling, who on the 20th of March, 1833, had the same in his possession and was the true and proper owner, and on the 2d day of March, 1833, one H. A. Thorn obtained a judgment against said Doling for ninety-seven dollars, before Wm. A. Hollingsworth, a justice of the peace, upon which an execution issued, which came to the hands of John A. Hollingsworth, a constable for said county, who summoned the defendant to appear before said justice as a garnishee, to declare on oath what property belonging to said Doling was in his possession, or what he was indebted to him. The defendant appeared before the justice, and declared there was in his possession 2000 lbs. of iron, which he then had ready to pay and discharge the covenant in plaintiff's declaration mentioned, and upon such declaration said amount of 2000 lbs. of iron was condemned in his hands as the property of Doling, and the execution was levied on it, and it was sold as the property of Doling, to satisfy the execution in favor of Thorn. To the first plea there was a replication and issue, and to the second and third pleas a demurrer. The issue was found in favor of the plaintiff, and the demurrer was sustained and judgment was pronounced against the defendant, from which he appealed to this court.

We think the demurrer to the second plea was properly sustained, because it does not aver that the defendant was ready to deliver the iron on the day specified in the contract, that the plaintiff nor any one for him, was present, during the day to receive the same, and that he has always since been ready to deliver the same. This averment, "that he has always been ready, and yet is ready," is essential to constitute a plea of tender, in such cases, a good plea. See

Nixon's administrator vs. Bullock, 9 Yer. 414: *Tiernan* KNOXVILLE, June, 1837.
vs. Napier, Peck's Rep. 189: *Waters vs. McAlister*, 4
 Hay. Rep. 200.

Wilson
 v
 Turk

The demurrer to the third plea was also properly sustained. The contract set out in this declaration is a money contract, with the privilege on the part of the defendant, to discharge it in iron, on the day it fell due. If the iron were not paid on the day, or at the place ready to be paid, and kept so continually ever since, the right to pay in iron was gone, and the plaintiff was entitled to recover the money.

As therefore the plea does not aver such continued readiness to pay the iron, it is not true that at the time of the garnishment the defendant had in his possession any iron belonging to Doling. If Doling was the assignee and owner of the note, the defendant owed Doling the money called for in it, and having no right to require Doling to take the iron in payment, it follows, that his surrender of iron when garnished, and the sale thereof to satisfy Doling's debt, could be no discharge of his obligation, or bar to this action.

Judgment affirmed.

WILSON vs. TURK.

After a suit has been pending several terms, an affidavit made by the defendant upon which to ground a rule for the plaintiff to show by what authority the suit was instituted, must state specially the cause or reason why the application was not sooner made.

Where an affidavit states the instrument sued on and lost, as a "note," it cannot be intended by the jury that it had a seal to it.

The facts of the case are stated in the opinion of the court.

REESE, J., delivered the opinion of the court.

This is an action commenced before a justice of the peace upon a lost note. The proceedings before the justice and in the county court were very irregular, but we have not deemed it material to look into those proceedings farther than to see

KNOXVILLE, that there was a judgment before the justice, which was not
June, 1837.

Wilson
v
Turk

merely void, but that the proceedings before him were of a character to lay ground for a jury trial in the circuit court, when the cause was brought there by *certiorari*. Subsequent to the filing of the record in the circuit court, pursuant to the writ of *certiorari*, proceedings took place, upon which two questions arise, which have been discussed before us.

1st. At the December term, 1836, two years after the award of the *certiorari*, and subsequent to one or two trials in the circuit court, the defendant, upon affidavit filed, moved the court for a rule upon Hiram K. Turk, for whose use the suit is brought, to show by what authority he used the name of James Wilson, in instituting and carrying on the suit. The rule was refused by the court upon the ground, that the application was made too late, and the question is, was this refusal for the reason assigned correct? And we think it was; not because such an application can in no instance be made after a trial in the cause, or after the case has for a considerable time been before the court, if the affidavit show the reason for such delay, as that the grounds upon which the application is made, came recently to the knowledge of the party. In this case it does not appear from the affidavit of William Turk, but that for two years before he may have questioned the authority of Hiram K. Turk, to use the name of Wilson. The practice would be most inconvenient to permit a party, term after term, to contest the matter of the suit upon other grounds, and at the last moment, without excuse for the delay, to call upon his adversary to show the authority asked for in this case.

2d. The defendant below insisted upon the statute of limitations of six years. The affidavit of Hiram K. Turk, before the justice, when the same was issued, described the instrument which had been lost, and was then sued on as a note dated in 1820, and due in 1821. There was no statement or intimation in the affidavit, or any where in the proof, that the lost instrument had a seal, or was not what the affidavit called it, a note or unsealed instrument. Upon this point the court instructed the jury that if the debt sued for was due by note, not under seal, the statute of limitations would bar the

claim; if due by note under seal, the statute of limitations would not bar the plaintiff's claim. That the legal import of the word "note" in the warrant and affidavit of the plaintiff was descriptive of a paper not under seal. The charge of the court was certainly correct. The jury upon this charge, in the absence of all testimony whatever, to incline the mind to depart from the legal import of the term note, could not, except arbitrarily and capriciously, have found it to have had a seal. As they did so, however, the court should have granted a new trial upon that ground. See 3 Yer. Rep. 321, also *Crowder vs. Nicholson*, 9 Yer. Rep. 454. Let the judgment be reversed and a new trial granted.

KNOXVILLE,
June, 1837.

Humbard
v
Smith

Judgment reversed.

HUMBARD vs. SMITH AND MORELOCK.

The creditor of a deceased debtor, resident at the time of his death, and at the time his administrators qualified, without the limits of the state, but who removed within two years after the grant of administration, into this state, and before suit brought, is not barred by the act of 1789, c 23, until three years from the qualification of the administrator.

By the act of 1789, c 23, creditors of deceased persons residing without the limits of the state, are allowed three, and creditors within the state two years, from the qualification of the personal representatives, to commence their suits. In such cases the residence of the creditor at the time of administration granted, and not at the time of the suit brought, determines the question whether his debt shall be barred in two, or three years.

R. J. McKinney, for plaintiff in error.

J. A. McKinney, for defendant in error

REESE, J. delivered the opinion of the court.

The only question in this case is, whether under the provisions of the fourth section of the act 1789, c 23, the creditor of a deceased debtor, resident at the time of the death, and of administration granted, without the limits of the state, but who, within two years from the time of granting administration, may have his domicil in the state, shall be entitled

KNOXVILLE,
June, 1837.

Clark
v
Howard

to the three years from the qualification of the executor or administrator, mentioned in the act, or to two years only? And we are of opinion that the residence of the creditor at the time of administration granted, and not at the time of the suit brought, determines the question whether he shall be barred by two, or by three years. If at the time of administration granted, the creditor resided within the limits of the state, and before the expiration of two years, removed beyond its limits, we think such removal shall not have the effect to extend the time of the bar one whole year. To say so, would contravene the policy of the statute. So on the other hand, if at the time of administration granted, the creditor reside beyond the limits of the state, and within two years remove his residence within, such removal shall not deprive him of the additional year within which to bring his suit. The difference of one year between resident and non-resident creditors, was probably produced by the belief that the non-resident creditor being usually at a greater distance, and in a different community might not so readily ascertain the facts of death and of administration. To deprive him of this advantage of longer time for inquiry and information, because, before the expiration of two years he had settled within the state, would neither be just to him nor consistent with the object for which the longer time was probably awarded to him by the statute. Let the judgment be affirmed.

Judgment affirmed.

CLARK vs. HOWARD.

Upon an appeal from the judgment of a justice of the peace to the circuit court, the defendant may, in the latter court, prove his account by his own oath, as an offset, although he did not make, or offer to make, such a defence before the justice.

GREEN, J. delivered the opinion of the court.

Howard obtained judgment against Clark before a justice of the peace for \$35 16, and costs, from which judgment Clark appealed to the county court, and the cause was, by

consent, transferred to the circuit court. On the trial in the circuit court, the defendant produced an account as an offset, and offered to prove it by his own oath, which was objected to by the plaintiff because it did not appear that the account had been filed with the justice at the time of the trial before him; the objection was sustained by the court, and for this cause alone, it refused to permit the defendant to be sworn. A verdict and judgment having been given against the defendant, he appealed to this court.

KNOXVILLE,
June, 1887.

Clark
v
Howard

We think the court erred in refusing the defendant to plead his account as an offset in the circuit court, although he had not insisted on that defence before the justice. The act of 1756, c 4, § 2, provides, that the plaintiff must file his account with his declaration, in order to be entitled to prove it by his own oath. By the act of 1819, c 25, § 2, defendants are permitted to prove their accounts, when offered as a set-off, in the same manner, and under the same rules and regulations, as the plaintiffs were then by law permitted to prove their accounts. This act requires, therefore, the defendant's account to be filed with his plea of offset. A party may make, in the circuit court, additional defences to those which were made before the justice; as the pleading in cases commenced before a justice is not in writing, there are no means of knowing what defence may or may not have been made at any former trial. The cause is always open for any defence which may legitimately be made to that action. The defendant below was not, therefore, too late in producing his account as an offset to this suit. Had the cause commenced in the county court and been taken to the circuit court by appeal, the defendant might, by leave of the court, have amended the pleadings and filed a plea of offset, at which time his account, to be proved by his own oath, might have been for the first time proved. The judgment will be reversed and the cause remanded for another trial, when the defendant will be permitted to prove his account, unless there be other objections than the one set out in this record.

Judgment reversed.

KNOXVILLE.
June, 1837.

KINCAID vs. MORRIS.

Kincald
v
Morris

A petition for a *certiorari* and *supersedeas* stated that a judgment had been rendered by a justice of the peace against the petitioner, which judgment he had paid, notwithstanding which, an execution had issued on it, and prayed that the execution might be quashed. The process was granted, and the fact of payment tried in the circuit court and found against the petitioner: Held, that a *procedenda* must, in such case, be awarded, and that the circuit court could not give judgment for the debt and twelve and one half per cent. interest against the petitioner and his security.

REESE, J. delivered the opinion of the court.

The defendant, Morris, in a petition to the circuit court, alleged that two judgments by the plaintiff obtained against him before a justice of the peace, had, after their rendition, been satisfied by payment. The correctness of the judgments themselves was not questioned, but the petition alleged that executions had been issued upon the judgments after such satisfaction by payment. A writ of *supercedeas*, to stay proceedings upon the executions was prayed, and also a writ of *certiorari* to bring up into the circuit court the executions, to the end that they might be quashed, and the executions only were brought up. A jury having been empannelled and sworn to enquire and say whether the defendant, Richard Morris, had paid the executions in the petition mentioned, as alleged in the petition, found that he had not so paid; upon which the court gave judgment against him for the costs, and awarded a *procedendo* to the justice that he issue executions, &c. From this judgment the plaintiff has appealed to this court, on the ground that he was entitled to a judgment in the circuit court against the defendant in the executions, and against his securities in the *supersedeas* and injunction bond, for the sums in the executions mentioned, with interest, &c.

The second section of the act of 1817, c 119, provides, that when any cause shall be brought up by *certiorari* or appeal from an inferior to a superior jurisdiction, and the same shall be dismissed for want of prosecution, or for other causes, it shall be the duty of the court dismissing the same to enter judgment against the principal and his securities for the amount of the judgment below, with costs, and twelve and one half per cent. interest from the date of said judgment.

This act intended to enlarge the remedy given by the act of 1807, c 81, § 2, which gave the judgment against the principal, and the petitioner and his securities, only when "cast in the cause," which had been construed to apply to a trial on the merits only, and not to a case where the writ was dismissed for want of prosecution or other cause. But it is obvious that the cases provided for in the act of 1807 and 1817 contemplate the bringing up the cause from the inferior to the superior jurisdiction for the purpose of re-investigating the correctness of the judgment, as if an appeal from such judgment had been taken. But in the case before the court the proceeding was in the nature of an *audita querela*; the original judgment was not impugned, it was not removed, if unpaid, it remained unpaid, and to have given one in the circuit court, would have been to have had two judgments in different tribunals in force for the same claim. We think the course adopted by the circuit court was correct and affirm the judgment.

KNOXVILLE,
June, 1837.

Kincaid
v
Morris

Judgment affirmed.

KNOXVILLE,
June, 1837.

ROGERS vs. FERRELL.

Rogers
v
Ferrell

The act of 1801, c 7, § 4, authorising two justices of the peace out of term time, to issue writs of *certiorari* and *supersedeas*, and the act of 1833, c 65, authorising two justices of the peace to grant writs of *certiorari* and *supersedeas* returnable to the circuit court, &c. only apply to cases where the party is dissatisfied with the judgment rendered against him, and wished a new trial on the merits, and not to cases where the judgment is not complained of, but from causes after its rendition as payment &c., no execution ought to issue upon it.

Where the writ of *certiorari* and *supersedeas* is used in the place of an *audita querela*, the cause is not removed from the inferior to the superior jurisdiction; and if in such case the *supersedeas* is discharged, a *procedenda* must (in cases not provided for by statute,) be awarded to the inferior tribunal.

It is only in cases where the judgment of the inferior court is sought to be re examined, that the proceedings are removed by the *certiorari*, in which case no *procedenda* ever was or ever can be awarded.

Where the judgment of a justice has been paid or otherwise discharged, and an execution issues thereon, the circuit court, by virtue of its general power, can grant writs of *certiorari* and *supersedeas* to quash the execution, &c.

Rogers obtained a judgment before a justice of the peace against Ferrell, upon which an execution issued. Ferrell applied to two justices of the peace for writs of *certiorari* and *supersedeas*, alleging therein that the judgment had been paid and praying the execution to be quashed, which upon hearing proof was done by the circuit court. Rogers prosecuted an appeal in the nature of a writ of error to this court.

Geo. S. Yerger, for plaintiff in error.

J. Crozier, for defendant.

TURLEY, J. delivered the opinion of the court.

The writ of *certiorari* is used in this State for the purpose of removing causes from an inferior to a superior court, for the purpose of having a new trial on the facts, where the party petitioning for it, has without his own neglect, been prevented from appealing; it is also sometimes used in connexion with the writ of *supersedeas* in the place of an *audita querela*, to give relief to the party against whom a judgment has been rendered in an inferior court, for causes which may have originated since the rendition of the judgment, as for instance, pay-

ment of the judgment and the issuance of an execution there-
 after. In both instances it is the exercise of power by a su-
 perior over an inferior court, and the process necessary for
 the purpose must always be issued by the order of the super-
 ior, except where it is otherwise provided for by law. The
 county court when it had jurisdiction of the trial of causes,
 was superior to a justice of the peace, and the circuit court to
 both. When a judgment was rendered by a justice, it was
 subject to correction by writs of *certiorari* and *supersedeas* by
 both the county and circuit court; but the power of the county
 court, could only be exercised for this purpose in term time,
 as no one justice or number of justices out of term time could
 constitute such court, they having no farther power than was
 given them by law as justices of the peace, except when as-
 sembled for the purpose of holding a county court under the
 provisions of the statutes creating such court. It then ne-
 cessarily follows that no one or more justices of the peace had
 the power, except it were given by express enactment, to *cer-*
tiorari or *supersede* the judgment of a justice of the peace, be-
 cause they were all equal in power and had concurrent juris-
 diction over the same cases.

KNOXVILLE,
 June, 1837.

Rogers
 v
 Ferrell

It becomes necessary then to enquire what power has been
 given by statute to justices of the peace over this subject.
 The act of 1801, c 7, § 4, provides that "when any person
 shall make application for a writ of *certiorari* and *supersedeas*
 to remove the proceedings of a justice of the peace in any
 cause which has been determined, the party petitioning for
 such writ, shall state his reasons on oath within twenty days
 after the date of the judgment before any two justices of the
 peace, and if upon examination, such reasons should be suf-
 ficient, said justices shall direct the clerk of the county court
 to issue writs accordingly." No one has ever doubted since
 the passage of this statute, that it was only intended to apply
 to cases where the party was dissatisfied with the judgment,
 and wished a new trial on its merits, and not to cases where the
 judgment was correct, but from causes arising after its rendi-
 tion ought not to be enforced. When the writ of *certiorari*
 and *supersedeas* is used in the place of an *audita querela*, the
 cause is not removed from the inferior to the superior court.

KNOXVILLE, for though under statutory provisions, judgment may some-
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times in such cases be given in the superior court, if the *supersedeas* be discharged; yet a writ of *procedendo* may be, and frequently of necessity is, awarded to the inferior tribunal, which could not be done if the proceeding were removed by the *certiorari*. It is only in cases where the judgment is sought to be re-examined, that the proceedings are removed by the *certiorari*, in which case no *procedendo* ever was or ever can be awarded.

The act of 1833, c 65, § 2, provides that "two justices may grant a *certiorari* and *supersedeas* to remove the judgment and proceedings of justices of the peace returnable to the circuit court of their county, subject to the same rules as now regulate *certiorari*'s as granted by a circuit court." We are of the opinion, that this statute was only intended to apply to cases where the proceeding by writs of *certiorari* and *supersedeas* is substituted in place of an appeal, and a new trial asked on the merits of the case. The statute uses the words, "remove the judgment and proceedings of justices of the peace." This, as has been observed, is never done when the judgment is not complained of, but relief is only sought from an unjust or illegal execution of it. At the time of the passage of this statute, a party against whom a justice of the peace had rendered a judgment, had the right to appeal either to the county or circuit court, but if by any accident he were prevented from appealing and was forced to resort to his petitioner for writs of *certiorari* and *supersedeas* as a substitute therefor, he was compelled either to take it to the county court by application to two justices within twenty days, or to apply to a circuit judge at chambers, which frequently produced much delay and inconvenience, to remedy which this statute was passed, authorising justices of the peace to issue writs of *certiorari* and *supersedeas*, returnable to the circuit court, which when there, were to be governed by the same rules and regulations as those granted by the circuit court. The supreme court in the case of *Dixon vs. Caruthers*, 9 Yer. Rep. 30, has determined that this statute does not extend the time within which application must be made to two justices, to wit, twenty days, but only authorises them to send the case at the

election of the party, either to the county or circuit court. It will be seen, then, that we are of opinion that neither of these statutes gives to justices of the peace the power to award the issuance of writs of *certiorari*, and *supersedeas*, which are to be used in the place of an *audita querela*—an attempt to do so is illegal and void. The circuit courts exercise this power, not by virtue of positive enactment, but by virtue of the general jurisdiction with which they are vested, and the control which they necessarily have the right of exercising over the proceedings of inferior tribunals.

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June, 1837.

Rogers
v
Ferrell

In the case now under consideration, two justices of the peace have suspended an execution upon the ground that it had been paid after the rendition of the judgment. This is illegal, and the *supersedeas* ought to have been discharged. We therefore reverse the judgment of the circuit court, and award a *procedendo* to the justice who issued the execution.

Judgment reversed.

KNOXVILLE,
June, 1837.

RHEA vs. THE STATE.

Rhea
v
The State.

An affidavit for a continuance in a state cause, by the defendant, stated that A and B were material witnesses for him, they were summoned but did not attend, that he believes he will be able to prove by the witnesses a good character, and other facts of vital importance, &c. The affidavit did not show where the prisoner's domicile was, or that he had ever lived in the county where the witnesses reside, nor that his character could not be proved by others: Held, that it was insufficient to continue the cause.

A prosecutor cannot be asked whether he did not express suspicions of another person, than the defendant, having committed the offence charged against the defendant, unless such suspicion was founded on facts within his own knowledge.

It is not competent for the defendant to prove by a witness, that he, the witness, had heard a slave confess that he committed the act, with which the defendant was charged.

For the facts of this case see the opinion of the court.

R. J. McKinney, for plaintiff in error.

Geo. S. Yerger, Attorney General, for the state.

REESE, J. delivered the opinion of the court.

The plaintiff was indicted and convicted in the circuit court, for Washington county, of the crime of larceny. The indictment was found at the July term, 1836; before the next stated term of that court, a special term intervened, at which time the cause was continued by the consent of parties, and at the November term, 1836, when the cause was called for trial, the prisoner made the following affidavit to procure a continuance of the cause. "The defendant makes oath that the testimony of Robert Rankin and David Moore, of Greene county, will be material for him on the trial of this cause, without the benefit of which he cannot come safely to trial. That said witnesses have been regularly summoned, but do not attend; that their non-attendance is not owing to the procurement or default of this affiant, but to the sickness of said witnesses, as affiant is informed. Said witnesses have known this affiant from his boyhood up, and by them he believes he will be able to prove a good character, and other facts of vital importance to his defence in this case. He expects he can have their attendance, &c. Upon

this affidavit being presented, the attorney general, on behalf of the state, proposed to admit that the witnesses named in said affidavit, if present, would swear to the good character of the defendant as stated in said affidavit, and that said witnesses were of good credit, reserving the right of introducing witnesses to prove that the defendant had not a good character, and the court upon that admission ruled the defendant to trial. It is urged that this was erroneous.

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June, 1837.

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The State

In questions of practice of this description, much must be confided to the discretion of the judge who presides upon the trial, and if the authority of this court were often interposed to prescribe or to reform the rules of circuit court practice, the interests of the public would, it is believed, be not generally promoted thereby. But waiving this consideration, let us inquire whether it was the duty of the judge, in the exercise of a sound legal discretion, to have postponed the trial upon the ground in the affidavit presented? We think it was not. We arrive at this conclusion, not by force of the reason which probably impelled the court below, the admission of the attorney general, for that admission going not to the truth of the fact, but being only that the witnesses, if present, would swear as stated, might have been in its practical operation, as has been argued, altogether illusory. We found our conclusion upon the character of the testimony to be made by the absent witnesses; it related to the standing and reputation of the defendant for honesty. The affidavit does not show where the domicile of the defendant had been. It may long have been in the town of Jonesborough, where he might have established a character for good or evil. It does not show that he had ever resided in the county of Greene; it states no sufficient reason why, of all the citizens of Washington and Greene, Rankin and Moore were selected to prove character; and it does not state that the same facts could not be as fully and satisfactorily proved by others. A character for honesty, where it unequivocally exists, can seldom be limited to the knowledge of a few persons. Unless the affidavit shows the party to be a stranger at the place where he is tried, and the member of another community, it will be intended that he is surrounded by those

KNOXVILLE, who, if his character be good, can be readily called upon to testify to the fact. As to the general allegation of the defendant in his affidavit, that by the witnesses named, he could prove other facts of vital importance to his defence, it could not entitle him to a continuance. When a party shows cause by affidavit, he must state facts in order that the court may determine their importance; his opinion of the importance of undisclosed facts can constitute no safe or proper ground for the action of the court.

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2d. The prosecutor, who was absent when the goods were stolen, and who was called merely to identify some of them, as having been in his shop, was asked by defendant's counsel, if after his return he had not expressed suspicions of another person, which being objected to by the attorney general, the court decided that any suspicions which the prosecutor might have entertained on any charge made against another, unless founded on facts within his own personal knowledge, were inadmissible as evidence. This opinion of the court below is so obviously correct, that no reasoning of ours can be necessary to fortify it.

3d. The defendant's counsel asked a witness if he had not heard a negro slave confess that he had stolen the goods in question. The court refused to permit the witness to answer this question. This was clearly right. See *State vs. Wright*, 9 Yer. Rep. Let the judgment be affirmed.

Judgment affirmed.

THE STATE *vs.* FARNSWORTH.KNOXVILLE,
June, 1837.

The State
v
Farnsworth

An indictment alleged, "that the defendant, on the first day of August, 1836, in the county of Greene, with force and arms, one chesnut sorrel mare, the property of John A. Park, did unlawfully and forcibly take from and out of the possession of the said John A. Park:" Held, that this charge did not constitute an indictable offence.

Geo. S. Yerger, Attorney General, for the State.

J. A. McKinn y, for defendant.

TURLEY, J. delivered the opinion of the court.

The only question presented for the consideration of the court in this case is, as to the validity of the indictment: it charges, "that the defendant, Henry A. Farnsworth, did, on the first day of August, in the year 1836, in the county of Greene, with force and arms, one chesnut sorrel mare, the property of John A. Park, unlawfully and forcibly take from and out of the possession of the said John A. Park." Does this contain a charge of a breach of the peace, without which, this bill of indictment cannot be sustained? We are of the opinion that it does not. It is an allegation of an unlawful taking; a trespass, but not a breach of the peace; no breach of the peace is committed in taking the property of another, unless it be taken from his person. A violation of the possession of property, either actual or constructive, where the owner is not personally present, is only remediable by civil suit for the trespass. This bill of indictment does not show what kind of possession was violated by the defendant. The mare may have been taken from the range, where the law says it was in the possession of the owner, in which case we apprehend no one would contend that an indictable offence had been committed. The case of *The State vs. Thompson*, 2 Ten. Rep. 98, was the case of a slave taken by force, not on the premises of the owner, nor in his presence, but in that case a distinction is attempted to be drawn between slaves and other personal property, making the taking possession of a slave indictable under circumstances where the taking possession of other property would not be.

In a case determined by the Supreme Court of the State

KNOXVILLE, at Reynoldsburg, in 1829, where a man had been indicted for
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breaking the stable, and taking by force, a horse claimed by
another, neither he nor any of his family being present at the
time, I heard that able lawyer Judge Robert Whyte say, that
the case from 2 Tenn. Rep. did not, at the time of its decision,
give satisfaction to the profession, and in the case then
under consideration, the court determined that the offence
charged did not contain a breach of the peace, and was not
indictable. We, therefore, are of opinion that the judgment
of the circuit court is correct and direct it to be affirmed.

Judgment affirmed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

NASHVILLE, DECEMBER TERM, 1837.

DEADERICK, *et. al.* vs. CANTRELL, *et. al.*

**NASHVILLE,
December, 1837.**

A will directed and authorised the executors to sell lands; the executors proved the will; joined in the sale and conveyance of the lands, and took the notes for the purchase money payable to themselves: Held, that this was an acceptance by both, of the trusts of the will.

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v
Cantrell

Trusts, in regard to the responsibility of co-trustees for the acts of each other, are of two classes, discretionary and directory, and the rules which govern each class, as to their liability for each other, are different.

A discretionary trust is, when by the terms of the trust, no direction is given as to the manner in which the trust fund shall be vested, till the time arrives when it is to be appropriated in satisfaction of the trust.

A directory trust is where, by the term of the trust, the fund is directed to be vested in a particular manner till the period arrives when the trust is to terminate.

In order to charge a trustee, in cases of discretionary trusts, for the acts of his co-trustee, some act by which the trust fund was obtained by his co-trustee, or some act of commission amounting to gross neglect, in permitting the fund to be wasted, must be shown.

When a trust fund is paid into the hands of one trustee, by the act, direction, or agreement of the other; or where the latter had it in his power

NASHVILLE, to have controlled or received the money, and did not, both are responsible.
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Cantrell

A trustee is liable for a breach of trust by his co-trustee, where the money has been received jointly by them; or, where a joint receipt is given, unless it be satisfactorily shown that the joining in the receipt was necessary, or merely formal, and that the money was in fact paid to his co-trustee.

Trustees were directed to sell land upon a credit; the land was sold by them; the notes for the purchase money were executed to them jointly, and remained in the hands of one, with the assent of the other, to collect; the court was inclined to the opinion that in such case, both were responsible, if the money were collected and wasted by him in whose hands the notes were left.

Where one trustee wrongfully permits the other to detain the trust fund a long time in his hands without security, he will be deemed liable for any loss.

Where a trustee voluntarily permits a co-trustee to receive purchase money, and retain it a considerable time without calling for it, contrary to the trust, he will be responsible for its loss.

Where the trust is directory, and the fund is not vested, or is vested in a different manner from that pointed out, it is an abuse of the trust for which all are liable, though but one received the money.

In directory trusts, all the trustees are bound to attend to the directions of the trust, and all must be careful to execute the trust faithfully and according to its terms, and in compliance with the intention of the person by whom it was created.

Where trustees in a directory trust were directed to loan out money to the best advantage, one of whom received the money and wasted it: Held, that the other ought not to be charged with compound interest

This bill is filed by complainant on behalf of himself and the other legatees of George Michael Deaderick, deceased, against defendants. It charges that George Michael Deaderick died in 1816, and by his will devised \$10,000 to complainant Fielding, and gave other legacies specified in the bill, and appointed Stephen Cantrell, Jesse Wharton, and Robert Searcy his executors, the two former of whom qualified and the latter did not; that the executors were to loan out said legacy till complainant arrived at age, and also the legacies due the other minor legatees; that the executors or

at least said Cantrell received his legacy, and that complainant has demanded payment of the balance due him upon his legacy, and it has not been paid. That Cantrell received the legacy and all the assets of the estate, with the knowledge and permission of Wharton, who joined Cantrell in selling and executing conveyances for the testator's land. That the legacies were not loaned out to the best advantage, that is, at stated periods, and the interest compounded, or in fact loaned out at all. That Cantrell made a settlement with the county court, styling himself testamentary guardian in 1833, from which it appears he is indebted to complainant, Fielding, the sum of \$14,441 34 cents, but in fact \$18,000 is due, and the settlement is erroneous. That the executors, Cantrell and Wharton, entered into a joint bond, and gave security jointly for the faithful performance of their duties. That Jesse Wharton is dead, and Sidney Smith, the other defendant, is his executor. Concluding with a prayer for an account, and for general relief, &c.

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The will of George Michael Deaderick, which is exhibited and made a part of the bill, contains the following provision: "It is my will that after my just debts are paid, that my executors sell my real estate to the best advantage at public auction, at four equal annual instalments, with interest from the date, the proceeds of which, together with the balance, if any, of my personal estate, I will and bequeath as follows: to my son, John G. M. Deaderick, I give \$15,000; to Fielding Deaderick \$10,000," &c. together with a number of other legacies to different persons, all to be paid out of the proceeds of the real estate. The will then proceeds, "It is my will and desire, that the several bequests herein before mentioned, shall be paid by my executors to the several legatees as they arrive to the age of twenty one years, with the interest that may accrue on each bequest; and desire my executors to loan out the money due to each minor legatee to the best advantage, and pay it over to the males at twenty-one, and to the females when they marry, or arrive at twenty-one. And for the purpose of enabling my executors to fulfil this will, they are hereby vested with full and complete powers to transfer, alienate, convey, and make title

NASHVILLE, to the lands and every other species of property I may
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Cantrell

possess at the time of my death, in as full and ample a manner as I can now do.

The answer of Wharton's administrator admitted the making of the will, the appointment and qualification of the executors, and the sale of the real property as charged in the bill; but the answer denied that Wharton was responsible, alleging that Cantrell was the active executor, and that he had received all the assets, proceeds of the real estate, &c. none of which ever passed through Wharton's hands, &c.

The facts upon which Wharton's liability depend were agreed upon by the parties, and a full statement of them is contained in the opinion of the court—a re-statement of them here is therefore deemed unnecessary.

Chancellor Bramblet was of opinion, that Wharton was liable, as a co-trustee, for the principal and compound interest, and decreed accordingly, from which decree an appeal was prosecuted to this court.

R. J. Meigs, J. Campbell and Geo. S. Yerger, for complainants, insisted, 1st. That Wharton by proving the will, joining in the sale of the real estate, executing conveyances therefor, and assenting to the notes for the purchase money being made payable to himself and Cantrell, accepted the trust and acted under it. Willis on trustees: 38, *Smith vs. Wheeler*, 1 Ventris's Rep. 126.

2d. Trusts are of two kinds, discretionary or directory. In cases of discretionary trusts, a co-trustee joining in conveyances or receipts for conformity, or merely being passive, by permitting his co-trustee to receive and retain the fund, &c., will not, in general, be responsible. But we think the evidence in this case clearly subjects Wharton to liability even if it were a discretionary trust. When, however, the trust is directory, as it is here, and points out the manner and mode in which the trust is to be executed, the trustees, by accepting the trust undertake jointly and severally to perform the trusts. The confidence, in such cases is reposed in all; it is the duty of each to act and to see that the trusts are performed, and each has power to compel, as against the others,

an execution of the trust in chancery. One cannot, in such case, be heard to say that he trusted to the other. The breach of trust by co-trustees in directory trusts consists, not in receiving the money, or permitting it to pass out of their hands, or joining in receipts or conveyances, but in not seeing that the trust money is invested as directed. Vide 1 Har. & Gill's Rep. 32, 73, 77: 3 Exch. Rep. 26, 312: Willis on Trustees, 195: 2 Story's Equity, 524: 5 Con. Ch. Rep. 487: 6 Exch. Rep. 117: 4 Con. Ch. Rep. 193: 11 Vesey, 119, 326, 327: Jeremy Eq. Jurisdiction, 147.

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3d. It was the duty of the trustees, in this case, to have loaned the money to the best advantage, which would have been to have compounded it from year to year, and to have loaned it on good security. 4 John. Ch. Rep. 281: 2 Story's Eq. 525, 516: 3 Swanson's Rep. 81.

F. B. Fogg, W. E. Anderson and E. H. Ewing, for Wharton's administrator, contended, that the personal estate of Deaderick having been exhausted in payment of debts, the question in this case arose entirely upon the liability of Wharton, as to the application of the proceeds of the real estate; that in regard to this the executors were constituted trustees of the real assets, by the will, and Wharton's liability was to be tested by the rules which subject trustees, as contra distinguished from executors. That a co-trustee who has not received the fund, or had the control of it, but who was merely passive, and who joined in receipts and conveyances merely for conformity, was not liable for the acts of the other trustee. They cited and commented on 2 Williams on Executors, 1118 to 1128: 5 John. Ch. Rep. 296: 6 John. Ch. Rep. 1 to 18: 7 John. Ch. Rep. 17: 1 Merivales Rep. 712: 7 Vesey Rep. 199: 6 Vesey Rep. 488: 3 Swanson's Rep. 1: 2 Story's Eq. 520: 11 Vesey, 326: 2 Bro. Ch. Rep. 114: 3 Bro. Ch. Rep. 112: 4 Con. Ch. Rep. 93: 1 Dallas Rep. 310: 1 P. Williams, 243: Fonb. Equity, book 2, p. 184: 2 Devereux's Equity Rep. 51, *Clark vs. Cotton*: 1 Dev. & Battle, 326, *Chiltree vs. Wright*.

They also contended that the evidence did not show such an acceptance of the trust by Wharton, as made him liable

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for the real assets. The probate of the will by him was only an acceptance of the trust, as to the personalty. That Cantrell did not receive the money as executor, but as a co-trustee, and that Wharton's joining in the executor's bond, &c. only made him responsible for the personal estate, as contra distinguished from the proceeds of the real estate. On these points they cited and commented on Leigh & Dalzeil, on Equitable Conversion: 5 Law Library, 27, 57, 103: 11 Mass. Rep. 190: 2 Randolph's Rep. 488: 4 Dessausere's Rep. 70: Williams on Executors, 1118 to 1128: 1 Sch. & Lefroy, 341: 2 Pennsylvania Rep. 419.

TURLEY, J. delivered the opinion of the court.

This is a bill of complaint filed by the legatees of George M. Deaderick, for an account and decree against Stephen Cantrell and Jesse Wharton, executors and trustees to the will of said George M. Deaderick, upon the following facts: Some time in the year 1816, G. M. Deaderick died in Davidson county, Tennessee, having previously to his death duly made and published his last will and testament, by which, after directing that all his debts be paid, and having appropriated to that purpose his personal estate and the rent of his lands, he provides, that his executors shall sell all his real estate at four equal annual instalments, with interest from the date, the proceeds of which he bequeathed to the complainants separately in different proportions, some of them being specific legacies and others residuary, payable at the different periods when those entitled thereto should arrive at the age of twenty-one, or marry; in the mean time he directs his executors to loan out the money to the best advantage. This will was duly proven by Stephen Cantrell and Jesse Wharton, two of the executors named therein, who took upon themselves the burthen of executing the same. In May, 1820, the said executors jointly proceeded to sell the real estate of the testator, and did sell and convey the same, upon a credit of one, two, three and four years, taking notes with interest from the date, payable to themselves jointly. These notes Wharton permitted to remain in the hands of his co-trustee and executor, Stephen Cantrell, who collected the same as they fell

duc, and instead of loaning the money to the best advantage, as directed by the will, appropriated it to his own use for a series of more than ten or twelve years, at which period of time he failed entirely, leaving a deficit in the assets of said estate of many thousand dollars. Wharton received no part of the money, and does not appear to have paid any attention whatever to the execution of the duties imposed on him by the will after the sale of the lands, until it was understood that Cantrell had failed.

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That Cantrell is liable for the amount of money and property used by him, is not disputed, indeed he has not appealed from the decree of the court below. Wharton's liability for the abuse of the trust by his co-trustee is disputed, and depends upon the following propositions.

1st. Did he take upon himself the execution of the trust imposed by the will? That he did is too evident to admit of debate. He proved the will and joined in the sale and conveyance of the land, and assented to the notes being payable to himself and Cantrell. Having accepted the trust and partially executed it, he could not denude himself of it afterwards.

2d. Was the trust abused? This proposition is also so clearly proved as not to have been denied. Stephen Cantrell, in violation of the directions of the will, which required the money to be loaned out to the best advantage, appropriated large amounts of it to his own use, for which he has never accounted.

3d. Is Wharton responsible for this abuse of trust on the part of his co-trustee? Trusts of the character now under consideration are of two kinds, distinguishable by the law as discretionary and directory trusts, the rules for regulating the responsibilities of co-trustees, being different when applied to these different trusts.

We will proceed to examine, 1st. When and under what circumstances a trustee is liable for an abuse of trust by his co-trustee, when the trust is discretionary; and 2d. When and under what circumstances he is liable, where the trust is directory. A discretionary trust is, when by the terms of the trust no direction is given as to the manner in which the trust fund shall be vested, till the time arrives at which it is

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to be appropriated in satisfaction of the trust. In such cases in order to charge a trustee for an abuse by his co-trustee, some act of commission must be shown on his part, by which the trust fund was attained by his co-trustee, or some act of commission amounting, to gross neglect in permitting the fund to be wasted. In the case of *Monell vs. Monell*, 5 John. Ch. Rep. 287, Chancellor Kent, after an elaborate examination of the authorities on that point, says, "It may be laid down as a principle, that if two guardians or other trustees join in a receipt for money, it is *prima facie*, though not absolutely conclusive evidence that the money came to the hands of both; that one trustee may show by satisfactory proof that the joining in the receipt was necessary, or merely formal, and that the monies in fact were paid to his companion; that without such satisfactory proof he must be liable to the *cestue que trust*; and that if the monies were in fact paid to his companion, yet if they were so paid by his act, direction or agreement, and when he had it in his power to have controlled or received the money, he is and ought to be responsible."

From this opinion we understand the chancellor to have held, that a trustee is liable for an abuse of trust by his co-trustee, 1st. When the money has been received jointly. 2d. When a joint receipt has been given, unless it be shown by satisfactory proof that the joining in the receipt was necessary or merely formal, and that the money was in fact paid to his companion. 3d. When the moneys were in fact paid to his companion, yet so paid by his act, direction or agreement. Chancellor Kent is high authority, and we are satisfied to adopt his conclusions on the subject under consideration, without entering into an investigation of the decisions from which he extracted these principles—we think it would but encumber the opinion and be a useless consumption of time. It is admitted in the case under consideration, that the money was not jointly received, and that no joint receipt was executed, but it is contended that the money was paid to Cantrell by the act, direction, or agreement of Wharton, and under such circumstances as must make him liable for its waste, and we think successfully. This is not like ordinary

cases of a fund outstanding, which has to be received by trustees, but it is a case in which property was devised to them to be sold, the notes of which were taken payable to both trustees. Upon the payment of the money no receipts were necessary, the notes were taken up by the makers, and being in the name of both it seems to us, without so determining, constitutes as strong, if not a stronger case than that of a joint receipt. But we do not hesitate to say, that the notes could not have gone exclusively into the hands of Cantrell, and the money been collected on them by him without the act, direction and agreement of Wharton; in fact, the case agreed shows that the notes remained with his assent with Cantrell. In 2d Story's Commentaries on Equity, 524, it is laid down by that able jurist, "that if by any positive act, direction or agreement of one joint executor, guardian or trustee, the trust money is paid and comes into the hands of the other, when it might and should have been otherwise controlled or received by both, then each of them will be held chargeable for the whole." Again, in note 1, p. 525, he says, "if a receipt be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, both shall be charged."

The true question in all such cases is, whether the money was under the control of both. Now the money must of necessity be in the hands of one or the other, as it cannot be in both at the same time. What then is meant by its being under the control of both? manifestly where it has been received by the act or consent of both. If one receive money outstanding without consulting the other, inasmuch as he had a right to do so, the other shall not be charged, but when a debt is due by note to both, one cannot receive it against the assent of the other, it being a debt due to them jointly, and for which they may sue as individuals, and the fund, when collected, would be held in trust. But if the fund was not collected in such a manner as to charge Wharton with his co-trustee's default, has not his negligence in attending to the execution of the trust made him so chargeable. At p. 525 of 2d Story's Commentaries, it is said, if one trustee wrongfully permit the others to detain the trust fund a long time in

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NASHVILLE, his own hands without security, he will be deemed liable for any loss. Where trustees voluntarily permitted a co-trustee to receive purchase money, and retain it a considerable time without calling for it, contrary to the trust, they were charged with the loss occasioned by their co-trustee. *Bone vs. Cook*, McClelland's Rep. 168, and cases there referred to.

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This principle is consonant with justice. Two trustees are appointed to execute a trust, the final operation of which is not to be completed for years, they undertake to execute it, they are intended as checks on each other, have an equal control over the fund, are mutually bound to attend to the interest of the trust, and shall one of them be permitted to go to sleep and trust every thing to the management of his co-trustee, and when in the course of ten or fifteen years the fund having been wasted, and his co-trustee insolvent, he is called upon to make it good, shall he be heard to say that he had implicit confidence in his companion, and permitted him to retain all the money, and appropriate it as he pleased, and that he ought not therefore to be charged? Surely not, it is neither law nor reason. This is what Wharton did, and this is his excuse and reason why he should not be made liable for the act of his co-trustee. We therefore think, that if this were a discretionary trust, Wharton is bound to make good the losses occasioned by Cantrell.

But this is not a discretionary, but a directory trust. A directory trust is when by the terms of the trust the fund is directed to be vested in a particular manner, till the period arrives at which it is to be appropriated. In such cases if the fund be not vested, or vested in a different manner from that pointed out, it is an abuse of trust for which both trustees are responsible, though but one received the money, because both are bound to attend to the directions of the trust, and must be careful to execute it faithfully, according to its terms and the intention of the person by whom it was created. *Bone vs. Cooke*, McClelland's Rep. 168: *Ringold vs. Ringold*, Har. & Gill Rep. 12: 3 Bro. Ch. Rep. 90, 112: *Oliver vs. Court*, 3 Exch. Rep. 312: 4 Cond. Ch. Rep. 93: *Brice vs. Stokes*, 11 Ves. 326. These cases so fully establish the principle above laid down, that it is useless to

comment further upon it, it fixes the liability of Wharton beyond controversy. The fund never was vested in pursuance of the directions of the will, but was wasted by Cantrell. We therefore affirm the decree of the chancellor, so far as it makes Wharton liable for the defalcation of Cantrell, but see no reason for charging him with compound interest, and reverse the decree thus far, and direct an account which shall charge him with simple interest on annual balances.

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Decree affirmed.

RICHARDSON vs. ADAMS AND WIFE.

A testator, in bad health, and about going to the south, made his will, in which his wife was made residuary legatee. He held a note on his father which he intended to will to him, but omitted it, whereupon he endorsed on the back of the note, "If I should never return, I wish this note given up to my father," and requested his wife to deliver it to his father, which she agreed to do. He, however, returned from that trip, and being about to take another, he told several witnesses that if he never returned he wished the note given up to his father; he frequently spoke to his wife also, and directed her, in case of his death, to give the note to his father, which she either promised to do, or acted in such manner as to induce him to believe she would do so. After his death, his wife qualified as his executrix, and claimed the note as residuary legatee: Held,

1st. That it was a fraud in the wife to claim the note, and that, under the above circumstances, she was constituted in equity a trustee for complainant.

2d. That the above facts amounted, in equity, to an extinguishment of the note.

William M. Richardson, the son of complainant, being in a low state of health, and about going to the south, did, on the 9th of November, 1831, make a will, whereby he gave, after specific bequests, the residue of his property to his wife, the defendant. The testator intended to have bequeathed a note due from his father to him for \$611 56, to his said father in his will, and mentioned it to Beverly Randolph, the scrivener, after the will was written, but Randolph told him he could endorse on the back of the note what he wished done, which would do as well as if mentioned in the will. He according-

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ly made the following endorsement on the note: "If I should never return, I wish this note given up to my father." Signed "W. M. Richardson." After testator's first trip to the south he returned to Tennessee, but as he was about starting on a second trip, he told Dismukes, the witness, "that the note was to be given up to his father provided he never returned." Before he returned from this trip he died.

The defendants took the deposition of W. M. Garnett, who proved that W. M. Richardson died at his house in April, 1833, that several days previous to his death, he spoke about his will, and wished to alter it so as to leave to his father a note which testator held on him for about six hundred dollars. He also proved that defendant, Mrs. Adams, formerly the wife of said Richardson, after her first husband's death, told the witness that testator requested her to give up the note to his father. This is also proved by several other witnesses. The defendant, the former wife of Richardson, married defendant, Adams. They brought suit and recovered judgment on the note, and this bill is brought for an injunction against the judgment. The answer admits the endorsement on the note, but relies upon a change of intention in the testator's mind before his death, and that the endorsement operated nothing, as he, the testator, did return from his first trip.

F. B. Fogg and *R. M. Burton*, for complainant. 1st. It is a fraud in the executrix to claim the note; she is a trustee for complainant. 11 Vesey, 638; Ambler, 67: 1 Vernon, 296: 2 Vernon, 700: 1 Pierre Williams, 288: 2 Vesey and Beames, 259: 3 Atkins, 539.

2d. Her own confessions show that her husband requested her to give his father the note, and that she promised to do it. This is an equitable extinguishment of the debt. *Wickett vs. Raby*, 3 Bro. Parl. Cases, 16: (2 Bro. Parl Cases, by Tomlin, 386:) 3 Atkins, 580, 581: 2 Story's Equity, 16.

3d. The endorsement on the note is testamentary, and the paper ought to be delivered up to be proved as a will. When an instrument is not intended as a will, but as an instrument of a different nature, if it cannot operate in the latter, it may in the former character; the form does not affect its title to pro-

bate, provided that it is to carry into effect the intention of the deceased after death. *Musterman vs. Maberly*, 2 Haggard, 235: 4 Ecl. Rep. 103: 1 Williams on Ex. 54, 55: 4 Vesey, 565: *Hunt vs. Hunt*, 4 New Hamp. Rep. 434.

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R. L. Caruthers, for defendants. Insisted, 1st. That the endorsement on the note was inoperative, because it was made previous to his first trip, and was conditional, depending on the contingency of his death before his return; but having in fact returned, it is wholly ineffectual.

2d. That his statements, made after his return, were merely evidence of an intention on his part to give by will or otherwise the note to his father; but having failed to carry this intention into effect by an actual gift, or by will, no interest or right was vested in the complainant.

3d. At all events, what he said could only be construed a verbal release, without consideration. This is insufficient to discharge the debt. Even a release in writing, but not under seal, will not discharge the debt, unless there is a valuable consideration. *Crawford vs. Millspaugh*, 13 John. Rep. 87: *Harrison vs. Close*, 2 John. Rep. 450.

4th. Admitting that the endorsement on the note is testamentary, and may be proved as a will, it can only amount to a conditional legacy, i. e. a gift of the note if he did not return from that trip, and having returned, the contingency upon which it was given never took place.

TURLEY, J., delivered the opinion of the court.

In the determination of this case, we do not deem it necessary to enter into a minute investigation of the proof, inasmuch as we consider that there is but little, if any discrepancy in it when properly considered, and that it abundantly establishes the following facts: That William M. Richardson, the son of complainant, and former husband of Mrs. Adams, being in a low state of health and about to take a journey to the south, felt that it was proper that he should dispose of his property by will before he did so, as he anticipated that he might never return home. That he procured his will to be written, by which he devised a large amount of property,

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both real and personal, specifically, to his wife, and also generally all his money, debts, dues and demands. That at the time of making his will his father was indebted to him, by note, in the sum of \$611 50. That immediately after his will was written, he observed that it was his intention to have bequeathed this note to his father, and that he wished his will altered so as to make a bequest to that effect, but did not do so, because he was informed by the person who drew it that he could endorse on the back of the note what he wished to be done with it, which would be as effectual as if he had mentioned it in the will; that in pursuance of this advice, he did write on the back of the note as follows: "If I never should return, I wish this note given up to my father." Signed "W. M. Richardson." That he frequently spoke to his wife on the subject, and directed her, in case of his death, to give the note to his father, and that if she did not directly promise him so to do, that she so behaved as to satisfy him that she had, and that he died in the full belief that she would do so; that she repeatedly said, after his death, that he had so instructed her, and that she would do it. That he had received a handsome advancement from his father, who was then in failing circumstances. That he was himself rich and childless, and had, by his will, left the great mass of his property unconditionally to his wife. That at repeated times after the endorsement made upon the note, directing it to be given to his father, continued up to within a few days of his death, he always made the same statements as to his intentions of having included the note as a devise to him in his will; and as to his wishes, that it should be given to him upon his death, with the exception of a few fretful moments, when he was complaining of his improvidence, and expressing an opinion that it would be utterly useless to give him any thing. But it is manifest that such was not his serious design, for every thing shows that he was much attached to his parents, and that he never intended that they should be harrassed by having the payment of the note enforced. Notwithstanding all which, his wife, upon her second marriage, forgetful of her former husband's repeated expressions of his wish, and her own promises, certainly made after his death, if not before, most probably as we

think before, has with her husband, and perhaps under his influence, caused the note to be put in suit and obtained a judgment at law thereon, to enjoin the collection of which, this bill has been filed. Several positions are assumed as grounds upon which to support the relief asked for in the bill.

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1st. It is said that it is a fraud in the defendants to claim this note as their property under the devise in the will, inasmuch as the devisee is, under the circumstances a trustee for complainant, and that this court will enforce the trust, and of this opinion is the court. It has long been well settled, that if a legatee prevent a testator from making provisions in a will for another, by promising that if it be not done he would do something for the person thus intended to be provided for, with which the testator is satisfied, that the person so promising shall be compelled so to perform. 1 Vernon, 296: Eq. Cases Ab. 405: 3 Atkins, 539. In the case under consideration, the testator was very anxious to devise the note in dispute to his father; he would have done so had he not overlooked it when his will was written; he would even have altered this will for that purpose, had he not been informed that his intention could be effectuated as well without; he frequently spoke about it to his wife, and up to the time of his death had an anxiety to have his will amended so as to make the devise. Who can doubt that he would have done so, if his wife had not promised that she would comply with his wishes, or acted in such a manner as to induce him to believe that she had so promised, and that he died in the belief that she would comply. If such be the facts, as we think they are, the case falls clearly within the spirit, if not the letter, of the decisions referred to.

But if this case wanted additional support on this point, it has it in the case of *Wm. Wickett and wife vs. John Raby*, reported in 3 Brown's Parliamentary Cases, page 16. There Mr. Pigot made his will, by which he left Mary, the wife of Wickett, his residuary legatee, and appointed her his executrix; but in his last sickness and a few days before his death, made the following declaration touching a bond due to him from Raby: "I have Raby's bond, which I keep, I don't deliver it up, for I may live to want it more than he, but when

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I die he shall have it; he shall not be asked or troubled for it.” After the death of Pigot, Raby being present at the inspection of his papers, amongst which was found the said bond, applied to Mary, the residuary legatee, and desired that she would make him a present of it, and to induce her to do so, he promised to be her counsel and serve her on all occasions, upon which she said to him, you may be easy, for it is safe in my hands. But Raby, hinting at accidents which might put it out of her power, such as matrimony, she replied, if I marry, I will deliver the bond to you the night before. She afterwards did marry, and the bond was put in suit, judgment at law obtained, and a bill filed to enjoin it, charging that Pigot had given Mary, his executrix, express orders to deliver up the said bond, and praying that the same might be delivered up to be cancelled. The executrix positively denied that Pigot ever gave her any orders to deliver up the bond, but owned that he declared in his last sickness, and within a few days before his death, that if Raby proved her friend, and was not able to pay the bond, she might spare him as he deserved. The case was heard before Lord Chancellor Macclesfield, who decreed that the bond should be given up to be cancelled, and satisfaction of the judgment acknowledged on the record, and that Wickett and wife should pay all the costs. From this decree an appeal was prosecuted to the House of Lords, where so much of said decree as ordered that the bond should be delivered up to be cancelled, and that satisfaction should be acknowledged on the record of the judgment, was, upon argument heard on both sides, affirmed. There is no opinion, either of the Lord Chancellor, or any judge in the House of Lords, published in the report, and therefore the reasons sustaining the decree can only be gathered from the argument of counsel for Raby, the appellee. It was said, “that a parol order, attended with Mr. Pigot’s declarations in his last sickness, and his express directions given to the appellant, Mary, her acknowledgments thereof, and her express promise to deliver up the bond, pursuant to those directions, were sufficient evidences of a trust reposed in her for that purpose, and her promises were also sufficient to enforce a performance of such trust.” How much strong-

er is this case than the one now under consideration; there, there was nothing but parol declarations of intention, here, there is a written endorsement on the back of the note, and that supported by a mass of parol evidence, both of intention, instruction and promises of performance, made, as we think, before, most certainly after the death of the testator, that is perfectly irrefragable. The case of *Wickell and wife vs. Raby*, has never been overruled, and although Judge Story, in speaking of it, says, "that it has gone to the very verge of the law," yet he does not deny its authority. From this case then it is clear that the note in this case is extinguished in equity.

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It is not necessary for us however to rest our determination upon this case alone, it is used only as ancillary to the other cases referred to.

There are two other propositions urged by the complainant, upon which it becomes not necessary for the court to express an opinion, viz: that the endorsement on the note is a testamentary disposition of it, and that if it be not, it is a *donatio causa mortis*. These are both grave and important questions, which we do not feel disposed to determine, as we are fully satisfied that the cause is with the complainant on the first point. The decree of the court below will be reversed, and a decree entered here for the complainant, in pursuance of the prayer of his bill.

Decree reversed.

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NASHVILLE BRIDGE COMPANY vs. SHELBY.

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Where public convenience requires a public ferry to be established, the owner of the soil on both banks of the river, is, in exclusion of all others, entitled by the act of 1807, c 25, to be the keeper thereof.

Public ferries are to be established by the county court, only in cases where the "public convenience" requires it.

If a public bridge is sufficient at all times to permit transportation safely and without delay, of all persons and effects, the mere fact that a ferry at or near the bridge, would produce competition, and thereby reduce the tolls of the bridge below the amount allowed by law, is not such a "public convenience" as will authorise the county court to establish the ferry.

The owner of land on both banks of a river has not, as a matter of right, and merely because he is owner, the privilege of keeping a public ferry.

The defendant in error, John Shelby, applied by petition to the county court of Davidson county, for liberty to keep a public ferry near where the bridge crosses the Cumberland river at Nashville. The petitioner was the owner of the land on both banks of the river, and claimed the grant of the ferry as a matter of right conferred upon him by the act of 1807, c 25. The Nashville Bridge Company, on motion, were made defendants, and opposed the grant of the privilege claimed by the petitioner. A number of witnesses were examined, who proved, that in their opinion the public convenience would be promoted by establishing the ferry, as it would produce competition, and thereby lower the bridge tolls below what was allowed by law. Testimony was also introduced by the Bridge Company, to show a waiver or abandonment of the right to keep a ferry on the part of the petitioner, which, however, it is unnecessary to state, as the judgment of the court was not predicated upon it. The county court refused to grant the petition. The circuit court, upon appeal, reversed the judgment of the county court and established the ferry. From the judgment of the circuit court the Bridge Company appealed in error to this court.

Geo. S. Yerger, for plaintiff in error.

J. Campbell, for defendant.

RESE J. delivered the opinion of the court.

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The right to receive compensation for the transportation of travelers and others, across a river on a public highway, is at common law a franchise of the crown. And this from the nature of the right is almost necessarily so. For no greater evil could well be imagined than the unrestrained power on the part of individuals to exact from the traveler, who cannot brook delay or stipulate for terms, what ever cupidity might dictate. When a grant of this franchise is made to a subject, it is deemed matter of common right that it should be made to the owner of the soil where the ferry is to be kept. The franchise here belongs to the State, and the grant is made by our law, through the county court. The act of 1807, c 25, secures to the owners of the land or of the landings, as against strangers, the right to keep a ferry, if the public shall see proper to establish one, passing over their property. If the owner of the land will keep the ferry, that act makes it the duty of the county court to grant it to him; but whether a ferry shall be established or not, depends upon the will of the public and the convenience of the community, not upon any claim of individual right. Upon the ground of individual right, and without a grant from the public, no one is permitted by the act of 1764, c 3, § 4, to keep a ferry or transport persons or effects for pay within ten miles of any existing ferry, established by the public upon the same river. This is a restriction, not upon the power of the county court to establish ferries within any distance of each other, which they may see fit, but upon the claim of right on the part of individuals to keep a private ferry.

The county court, therefore, in this case, were under no obligation of duty imposed by the law to grant the petition of the defendant in error, upon the ground of any claim of right on his part. The only question for them to have determined was, whether public convenience made it proper to grant the prayer of the petitioner. The application is to have a public

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ferry established adjacent to and almost in juxta position with the Nashville Bridge, which it seems is in a state of good repair, and capable at all times of transporting safely and without delay, all persons and all effects which require transportation. A ferry would transport persons and effects with more delay and with less safety. Public convenience therefore, does not demand the establishment of a ferry, unless it could be called public convenience to reduce, by competition, the tolls of the bridge below the amount conceded by the public to the Bridge Company in the charter of incorporation. And surely this cannot be insisted on. In language it would be a solecism—in act it would be bad faith. The record presents other grounds in the conduct of the petitioner when the bridge was about to be built, and in his acquiescence since, which perhaps would bring us to the same result. But it is unnecessary to consider of them, because we are satisfied upon the general views above presented, that the county court acted properly in refusing the application of the petitioner, and we affirm their judgment. The judgment of the circuit court must therefore be reversed.

Judgment reversed.

ALLSUP *vs.* ALLSUP's heirs and adm'rs.NASHVILLE,
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A suit cannot be instituted against a foreign executor or administrator in the courts of this State in virtue of his foreign letters testamentary or of administration, but new letters of administration must be taken out according to the laws of this State.

But where foreign administrators have closed their administration, and two of them are resident here, and the heirs and distributees as well as the administrators are before the court, if there is a surplus in their hands, they hold such surplus as trustees, and a court of chancery here may interpose between the administrators and distributees, and compel the former to pay such surplus to a creditor here.

F. B. Fogg, for complainant.

J. Campbell, for defendant.

REESE, J. delivered the opinion of the court.

In the year 1826, Thomas H. Allsup died intestate, in the county of Lauderdale, in the State of Alabama, where also was his domicil. In that year, administration upon his estate was granted by the orphans court of Lauderdale county, to three of the defendants, two of whom resided in the county of Lincoln, in this State, and the other in the county of the intestate's domicil. In 1828, the administrators, under the provisions of a statute of Alabama, made to the orphan's court of Lauderdale county, a declaration setting forth, that the estate upon which they had administered was insolvent, the effect of which proceeding is to prevent the institution and to suspend the prosecution of suits against the personal representative, and to entitle such creditors as may, in the prescribed time, come before the court and properly ascertain their claims to a pro-rata distribution of the assets among them.

The complainant had in the life time of the intestate, purchased from him a tract of land lying in the county of Lincoln in this State, had paid him the consideration money, and had received from him a bond for the conveyance of title to the land. In July, 1828, and after the proceedings above stated were had in Alabama, the complainant filed this bill against the administrators, the widow and the heirs of Thomas H.

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Allsup, for the specific execution of the contract of sale, or if a title could not be made by the defendants, that they should be compelled to refund to him the consideration. Answers were filed by all the defendants, in which they admit the sale and the bond for title, the payment of the consideration, the imputed difficulties with regard to the title, and state their inability to make a conveyance prior to the determination of certain suits, in which the validity of their title was involved. These suits were decided against the title of the defendants, and in September, 1830, by leave of the court, they filed their amended answer, in which the administrators set forth the declaration of insolvency, with regard to the estate, by them made to the orphan's court of Alabama, and insist that by the law of that State this suit should abate. Upon which the complainant filed an amended bill, stating the result of the suits above mentioned, and the recovery of the land in question, by a title paramount to that of defendants, and charging the administrators in general terms with a mal-administration and waste of the assets, which allegation is denied by the defendants in their answer. Much testimony was taken in the cause, an inquiry of damages was submitted to a jury, and a verdict was found ascertaining them, upon which a decree was pronounced in favor of the complainant and against the administrators of Thomas H. Allsup, from which an appeal has been prosecuted to this court.

The question chiefly debated before us is, whether a foreign administrator can be sued in that character in this State? This question we do not hesitate to answer in the negative. Justice Story, in *Conflict of Laws*, p. 422, § 513, says: "It has become a general doctrine of the common law, recognised both in England and America, that no suit can be brought by or against any foreign executor or administrator in the courts of this country, in virtue of his foreign letters testamentary or of administration, but new letters of administration must be taken out and new security given, according to the general rules of law prescribed in the country where the suit is brought." See the ample list of authorities referred to by Justice Story which fully sustain his position. It is true, indeed, that the State of Tennessee, by a provision in the act of

1809, c121, almost peculiar to this State, has permitted suits to be brought against her citizens by foreign executors or administrators, by virtue of their foreign letters testamentary or of administration, without giving security or subjecting themselves to account in any way to our courts of probate, for the proceeds of the local assets. But this concession of rights on the part of Tennessee to her sister States, more generous perhaps than discreet, cannot have the effect to subject to the action of her courts the assets within a foreign jurisdiction. Indeed, the rights of her citizens are more restricted by the operation of the act of 1809, than are those of the citizens of other States.

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If one administer here upon the estate of a decedant whose domicil was in Tennessee, and go elsewhere to collect personal assets existing in specie, and to remove them, he is subject to be sued and to be rendered liable to the extent of their value as an executor of his own wrong, by the foreign creditor of the decedant. If he seek to recover assets lying in action, he must administer and account for the proceeds to the foreign jurisdiction and pay the claims of the foreign creditors, before he can bring the surplus to be administered here. But the foreign administrator or executor may come here, and by suits in court or otherwise, collect assets, and go hence without account, unless indeed they might while in *transitu* be detained in some mode at the instance of the domestic creditors. It therefore makes no difference in this case, we think, under the circumstances, that certain of the assets were received by the administrators within our own local jurisdiction, even if that matter had been stated in the bill and had not appeared in the proofs merely; for they were removed before the institution of this suit, and have been accounted for to the orphan's court in Alabama.

It is true, indeed that about the year 1825, the supreme court of this State in the case of *Richmond vs. Edwards*, (not reported,) upon the general question which we have been discussing, came to a different conclusion from ourselves. That was an action of debt against the defendant as administrator, who pleaded that he was not administrator, to which the plaintiff replied, that the defendant had administer-

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ed in Alabama, and exhibited with his replication, a copy of the letters of adminisiration in Alabama. To this replication a demurrer was filed, which in the supreme court was held to be bad.

But to this decision we cannot assent. The contrary doctrine is supported by a weight of authority altogether overwhelming, and it is based upon grounds of just reason and international convenience, to disregard which, would almost place a State without the pale of civilized communities. In a nation like ours, so highly commercial and of such intimate intercommunication, and consisting of so many distinct governments, regulated by diversified and sometimes conflicting systems of law, to subject an administrator to be sued in that character, in every foreign jurisdiction in which he might happen to be found by a creditor, would produce confusion and disaster almost beyond our power to imagine or describe.

We think, therefore, that the decree in this case is erroneous. But as the very debt of this complainant was exhibited to the orphan's court of Alabama by the defendants in their declaration of insolvency—as two of the administrators are resident within our local jurisdiction, and as the heirs and distributees of the intestate, as well as the administrators, are parties to this suit, we are of opinion, that if the administrators have closed and made a final settlement of their administration in Alabama, a court of chancery has a right to interpose between the administrators and the distributees, on behalf of the complainant, and to decree that the former in their character as trustees, shall pay any such surplus to the complainant in satisfaction of his debt. See 7 Cow. Rep. 64: 6 Coke Rep. 47. This will not produce any interference or conflict with the local jurisdiction of Alabama. Whatever is *res judicata* there, will remain unaffected by the action of this court. As the records of settlements made by the administrators with the orphan's court in Alabama, and by the defendants exhibited in this case, make it probable perhaps, that there is a surplus in the hands of the administrators belonging, not to the Alabama creditors, but to the distributees, the complainant, if he wishes it, may have an account for the purpose of ascertaining whether there be such surplus. If, upon ta-

king the account such surplus should be found unadministered in the hands of the defendants, the same shall be applied, first to the payment of the costs of this suit, then to the satisfaction of complainant's debt. But if there be no such unadministered surplus, or not sufficient to pay the costs of this suit, then the heirs and distributees shall pay their own costs, and the defendants, the administrators, shall pay the balance of the costs, until the filing of their amended answer in 1830, and the complainant the balance of the costs after the filing of such amended answer.

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Judgment reversed.

WILLIAMS vs. TURNER.

Testator devised personal property to his children, and then proceeded thus, "It is my wish and desire that should any of my children die without increase, that my executors shall take back the property that I have devised to them, and divide it amongst the rest of my children." Held, that this limitation was not too remote, but created a good executory devise, if either of the devisees died without issue at the time of his or her death.

Baily Turner made his will in 1834, and shortly thereafter died. The clause in the will which is the foundation of this suit, is as follows. After a previous devise to his children, the testator proceeded, "it is my wish and desire that should any of my children die without any increase, that my executors shall take back the property that I have devised to them, and divide it amongst the rest of my children." The property thus bequeathed, consisted of slaves and other personal property.

Jane H. Turner, one of the children and devisees of Baily Turner, married the complainant, Williams, after the death of the testator. She afterwards died without issue. The complainant administered upon her estate, and filed this bill for a portion of the estate of Baily Turner deceased, which he claimed as administrator of his deceased wife. The chancellor decreed that Baily Turner's will, vested the absolute property in his children, because the limitation to the surviving children was too remote. This decree was appealed from.

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W. Thompson, for complainant, contended, that the limitation to the surviving children was too remote—that the word “increase,” was synonymous with “issue,” and if so, it was a limitation after an indefinite failure of issue, which in both real and personal estate made the executory devise void. He cited 4 Kent’s Com. 273 to 275: Fearn on Rem. 444.

Geo. S. Yerger, for defendants, admitted the general rule to be as stated by complainant’s counsel, but this being a case of personal estate, courts will lay hold of any expression which denotes an intention to tie up the generality of the words, “dying without issue.” Fearn on Rem. 471 to 476, and cases there cited: *Anderson vs. Jackson*, 16 John. Rep.: *Cudsworth vs. Hale*, 3 Des. 258: *Cliften vs. Heig*, 4 do.: 10 John. Rep. 12: 1 Harris and Gill 111: 2 Mun. Rep. 479.

In all the cases whether of real or personal property, although a dying without issue generally, may be too remote, yet if there are words restraining it, it is good. Fearn 468: *Kilpatrick vs. Kilpatrick*, 13 Ves. Rep. The words in this case which restrain it are, “that the executors are to take back the property and divide it amongst the rest of the children.” This shows the testator intended to confine the limitation to “issue” or increase living at the death of the first taker. These words in the case of real estate, have been held sufficient to create a good executory devise. *Anderson vs. Jackson*, 16 John. Rep.: *Lewis vs. Claiborne*, 5 Yer. Rep. 166. And however doubtful the authority of these cases may be in cases of real estate, (vide 1 Kent 282, note *a*,) yet upon all hands it is admitted they are clearly the law as regards personalty.

The words, “shall return to my executors and be divided by them,” are held to create a personal trust to be performed within the time allowed by law to prevent perpetuities. *Kelly vs. Fowler*, 6 Brown’s P. Cases; cited, Fearn, 482: *Jackson vs. Christmas*, 4 Wend. Rep. 277.

Again, the term “increase,” has no technical effect or meaning. It is always used as synonymous with “children,” as contra-distinguished from the word “issue.” If it means “children,” the limitation over is clearly good. 4 Kent’s Com. 278: 5 Day’s Rep. 517: 2 Hill’s South Carolina Rep. 544:

REESE, J. delivered the opinion of the court.

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The complainant is the husband and administrator of Jane H. Williams, formerly Jane H. Turner, one of the legatees under the will of Baily Turner deceased, and the question which constitutes the subject of dispute in this cause is, whether the husband is entitled to her legacy, or whether the defendants are so entitled, under a limitation in the will. The clause of the will upon which the question arises is the following: "It is my wish and desire, that should any of my children die without any increase, that my executors shall take back the property that I have devised to them, and divide it among the rest of my children. Do the terms of this clause constitute a good executory devise of the share of Jane H. Williams, to the surviving children of the testator, she having died without issue, or, in the language of the will, "increase" living at the time of her death?

The words "die without issue," by a long train of decisions, of themselves import an indefinite failure of issue, whether used in reference to personal or real estate, and the question therefore is, whether the accompanying words shall in this case limit and restrict the meaning of those terms to a dying without issue living at the death of the deviser. It is well settled, that in a case of personal property, as is the case before the court, the fixed and technical meaning of the words "dying without issue," will be permitted more readily to give way to the force of restrictive words than in the case of real estate.

But the circumstances in this case, showing it to be the intention of the testator to limit the dying without issue to the time of the death of the devisee, are of such strength as to constitute a good executory devise, as well of lands, as of chattels. His executor was to take back the property and was to divide it among the rest of his children, showing that the failure of issue was expected to take place during the life of the executor, who was to act in the matter; to wit, take back and divide the property, and the division was to be made among the rest of the testator's children. These terms clearly restrict the operation of the general words, "dying without is-

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ry devise must therefore according to the rules of law, have effect. It is needless to refer to, or comment upon authorities so abundantly existing upon this subject, for it is believed no case of personal property can be found in England or the United States, where restrictive words of equal efficacy have been used, and the courts have failed to declare them as constituting a good executory devise.

The decree of the chancellor will be reversed and the bill must be dismissed, but let neither party recover costs.

Decree reversed.

DAVIS vs. RICHARDSON *et al.*

Testator bequeathed as follows: "I give my dearly beloved wife, all and singular, my personal property, credits, household furniture, my stock of all kinds, by her fully and freely to be disposed of and enjoyed during her natural life or widowhood." And in a subsequent clause of the will, he directed that, "at her death or marriage, if there shall be any property left, Jenny, Huldah, Frances and Lovey, shall have each a feather bed and ten dollars, and if there shall be as much, my six daughters shall have forty dollars each; if there should be any thing left, that shall be equally divided among all my children:" Held that the absolute property in the goods and personal estate was vested in testator's wife.

A gift or devise of personal property for life, with an unlimited power of disposition, conveys the absolute interest in the property.

The facts in this case are stated in the opinion of the court.

Frierson, for complainant.

G. J. Pillow, for defendants.

TURLEY, J. delivered the opinion of the court.

The question for the consideration of the court in this case, arises out of the construction of the will of Thomas Richardson deceased, the fourth clause of which, is in the words following: "I give my dearly beloved wife, Jane Richardson,

all and singular, my personal property, credits, household furniture, my stock of all kinds, by her fully and freely to be disposed of and enjoyed during her natural life or widowhood."

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The fifth clause is in the words following: "At her death or marriage, if there shall be any property left, Jenny, Huldah, Frances and Lovey, shall have each of them a feather bed and ten dollars, and if there shall be as much, my six daughters shall have forty dollars each, before there is a general division; but after they have gotten forty dollars each, if there should be any thing left, that shall be divided equally among all my children." Did the testator intend by this will to vest in his wife an estate for life only, or did he intend that she should have the power during her life time to sell and dispose of the same, and if any should be undisposed of at her death, that the same should descend to those further provided for in his will?

That his intention was to give his wife an unrestricted right to dispose of and use the property in any way she might think proper, untrammelled by the claims of others, is, we think, evident. The words "and to be freely disposed of and enjoyed," certainly can mean nothing less than that she may exercise her own judgment as to the most effectual mode of making the property useful to herself. If she think proper to keep it and live upon the income arising from it, she may do so; if she think proper to sell and spend it, she may likewise do so; and that the testator anticipated that the latter course might be pursued, is evident from the fact of his only disposing of what might be left of the legacy after the death of his wife. The legacy was a valuable one, and yet when he comes to make provision for any unexpended remainder he says, "if there shall be any property left," three of his daughters are to have a feather bed each, and ten dollars in money, and if there shall be as much, his six daughters shall have forty dollars each, then if there be any thing left it shall be equally divided, &c. Now if he had not intended to give his wife an absolute interest in the property, with unlimited power of disposal, he could have had no doubt as to the amount which would have been left at her death, but he supposed that she might not spend it all, and thought he could provide by his will for the dispo-

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sal of the remainder. That a gift or devise of personal property for life, with an unlimited power of disposal, conveys an absolute right thereto, cannot now be disputed. The question has been elaborately investigated by this court in the case of *John Smith T. vs. Robert Bell and Wife*, Mar. & Yer. Rep. 302, and in the case of *David and others vs. Bridgeman and others*, 2 Yer. 558, and so decided—further investigation would be useless. We therefore think that the complainant has no interest whatever in the property sued for, and reverse the decree of the chancellor and dismiss the bill.

Decree reversed.

JAMISON vs. POOR *et al.*

Testator, having two families of children, made his will, in which, after making provision for the children of his first marriage, he devised all the rest of his real and personal property to his wife, for the support of herself and children during her life, and at her death or marriage, the property devised to her was to be equally divided among his children of the second marriage; then comes this clause: "If any of my children of the second marriage die before my wife, and before the division of the property, without lawful issue, it is my will that the share of such child form a part of the general stock to be divided among the other children of the second marriage. If any such children die before my wife, leaving lawful issue, such issue is to take the share of the deceased parent." One of the female devisees died during the lifetime of the testator's wife, leaving a child, which child also died before the testator's wife: Held, that such child was entitled absolutely to its mother's share of the property, and upon its death, it vested absolutely in the father of such child.

For the facts upon which the judgment of the court was predicated, see the opinion.

W. A. Cook, for complainant.

W. Thompson and *Geo. S. Yerger*, for defendant, Poor.

GREEN, J. delivered the opinion of the court.

William C. Jamison, being possessed of a considerable estate, and having two families of children, made his will, in

which, after having made provision for the children of his first marriage, he devised all the rest of his property, real and personal, to his wife, for the support of herself and children during her natural life or widowhood; at the death or marriage of his wife the property devised to her was to be equally divided among his children of the second marriage. Then comes the following clause: "If any of my children of the second marriage die before my wife, and before the division of the property, without lawful issue, it is my will that the share of such child form a part of the general stock to be divided among the other children of the second marriage. If any of said children die before my wife, leaving lawful issue, such issue is to take the share of the deceased parent."

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Elizabeth Jamison, one of the daughters of the testator by the second wife, intermarried with the defendant, Zachariah Poor, by whom she had a daughter, Sarah Elizabeth Poor. Elizabeth died before her mother, and a short time after her death, and before the death of Mrs. Jamison, Sarah Elizabeth, the infant daughter of Elizabeth, also died. The defendant, Poor, administered on the estate of his wife and daughter, and claims the share of her father's estate to which his wife, had she survived her mother, would have been entitled under the will. Mrs. Jamison is dead; and this bill is brought to settle the rights of the parties, and to enforce a division of the estate. By the plain words of the will, on the death of Elizabeth, her share of the estate vested in her daughter, Sarah Elizabeth Poor, and upon the death of Sarah Elizabeth Poor, her father, the present defendant, became entitled to all her estate, both real and personal.

The will is, that if a child die without issue, the share of such child is to form part of the common stock to be divided; but not so if such child die leaving issue. In that case, such share is to vest in the issue. But it is insisted, that this clause does not express the intention of the testator, as it is to be ascertained by looking at the entire will. In the first place, it is supposed that the testator postponed the absolute vesting of the estate in the children until after the termination of the life estate, in order to secure the property in his own blood until that period, and as that object would not infallibly

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according to its literal meaning; it is insisted we must give it a meaning, which will accord with such general intent.

This is an ingenious suggestion of the probable purpose of the testator, and possibly, if the state of facts now existing in this case had been suggested to him as likely to occur, he might have framed his will in accordance with the views of complainant's counsel. But it is unnecessary for us to seek in the uncertain field of conjecture, for a reason why the estate was not absolutely vested in the children, until after the termination of the life estate. The will itself states the reason. The entire estate, real and personal, was given to his wife "for the support of herself and children during her natural life or widowhood." The children were young, and the testator wisely provided that they should be entirely dependant on their mother for education and support, thereby, the more certainly to secure to her their obedience and respect. This, together with the purpose to provide amply for the support of his wife, we conceive to have been the obvious view with which this provision was made, and that the design suggested in the argument did not enter into the mind of the testator. He, no doubt supposed it probable, that of so many children some of them might die without issue before the death of their mother, as some of them were very young, and for that event he provided, by directing that the share of such a one should form a part of the general stock to be divided. But we do not think the will affords evidence that he contemplated it as probable that any of his children would have issue and die, and then that issue would die before the life estate would terminate. Few men look beyond their grand children in disposing of their estates; and we think the testator in this case, was content, after providing for his grand children, as in the latter part of the clause under consideration, to leave his estate to the disposition of the law.

Any other view of the case would compel the court to suppose that the words "die without issue" were used in their technical sense, which would make them mean an indefinite failure of issue, and then to restrain their signification to the dying without issue, living at the period of the division. This

would be giving to the clause under consideration an highly artificial meaning which would not be warranted, unless it were necessary to effect a clearly indicated general intention of the testator. We do not think such general intention existed in his mind, and we therefore give to the words employed their obvious sense, which is, that if one of his children should die, leaving a child or children living, such issue should be vested with an absolute title to such portion of the estate as the deceased parent would have been entitled to have received if living. Vide *Wilkins vs. Kemeys*, 9 East. Rep. 366. The defendant, Poor, is therefore entitled to the portion of his late wife, Elizabeth.

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Let the decree be reversed and reformed, so as to declare the rights of the parties as they exist according to the views herein taken.

Decree reversed.

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STEELE vs. CORPORATION OF NASHVILLE.

Where a contract for the delivery of cast iron pipes stipulated, that a particular test, to wit, a water pressure equal to a column of water three hundred feet in height, shall be applied to ascertain their quality, no additional or severer test than that stipulated for, can be applied.

Where cast iron pipes were to undergo a certain test at the furnace, and were afterwards to be delivered in Nashville, but the party receiving them was at liberty to reject all the pipes at their arrival in the city, which were found defective, although they had been previously tested at the furnace: Held, that if they were received without objection at Nashville, they became the property of the party who thus received them.

A court of equity does not require that a party to a contract shall go on, after it is violated by the other party, in a ruinous fulfilment of it, in order that he may prosecute an action at law. In such case equity will entertain jurisdiction to put an end to the contract, and will afford such relief as to right and justice may belong.

For the facts of the case see the opinion.

W. A. Cook and W. Thompson, for complainant.

T. Washington and Geo. S. Yerger, for defendants,

GREEN, J. delivered the opinion of the court.

This bill is filed to have an account, and recover compensation from the corporation of Nashville, for a number of pipes and other castings delivered by the complainant to the corporation, for the water works of said town.

The contract between the parties is contained in a proposition submitted by the corporation to Joseph Anderson & Co., of which firm complainant was a member, and their letter of acceptance of the terms proposed.

The proposition, after describing the dimensions of the castings, proceeds as follows: "The pipes, branches and circular pipes must be in size and form agreeable to the annexed drawings, signed by the parties, of good metal, which will not crack by handling, and which can be easily drilled. The outside, and particularly the inside of the pipes must be smooth without projections or cavities, and no pipe will be

received which has projections in the inside, or which will not allow a free and easy passage through the pipe from one end to the other, of a circular piece of iron equal in diameter to the bore of the pipe. The pipes, branches, and other castings, are to be proved in presence of the watering committee, or their agent, by means of a hydraulic press, or water pressure pump of Bramah, under a pressure equal to a column of water of three hundred feet in height, and at the expense of the contractor, who has to erect a pressure pump at the furnace. The watering committee, or the agent, will attend to the proving of the pipes and other castings, as soon as there are sufficient numbers cast, and mark the pipes and other castings which stood the proof, and were found, after a careful examination, without any defects.

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“The contractor must find the patterns, which must be approved by the watering committee, or their agent; the pipes and other castings will be received free of expense, at the Broad Street wharf, if they arrive in boats, or if brought in wagons, at the place of deposit pointed out by the watering committee, or their agent.

“The watering committee or their agent shall be at liberty to reject all the pipes and other castings at the arrival in the city, which they find defective, although they had previously been marked at the furnace. The pipes and other castings shall not be unloaded, without giving previous notice to the watering committee or their agent.

“The number and size of the pipes, branches and other castings above stated, shall not be binding on the watering committee, and they shall be at liberty to vary the number and size at pleasure.

“In case the pipes and other castings should not be delivered at the above stipulated time, the watering committee shall be at liberty to purchase the pipes and other castings necessary for the Nashville water works, as above stated, at the cost and expense of the contractor, at any place where they may think proper. The payments to be made thirty days after the delivery of each parcel of pipes and other castings as above stated. The proposals to state the price per pound

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"F. PORTERFIELD, Chairman

"Nashville, 4th Jan. 1831."

To this proposition, Joseph Anderson & Co. returned for answer, that they would deliver in the city of Nashville the cast iron pipes, branches and other castings necessary for the water works, agreeable to the above proposition, at two and a fourth cents per pound, and strictly attend to the conditions contained in said proposition. Under the above contract a considerable number of pipes and other castings were delivered in Nashville, and taken into the possession of the watering committee. The test of the pressure pump was applied to all the pipes thus delivered, at the furnace, and having stood the proof, they were marked by the agent of the watering committee. When the engineer was about to lay these pipes down, in the construction of the water works, he applied the further test of striking the pipes with a hammer, which disclosed blisters and other defects in many of them, which rendered them unfit for the use for which they were intended, and they were rejected. The complainant and Mr. Steine, the engineer, differing as to the application of the hammer, as a test of the pipes, and as to the right of the watering committee to reject them, after they had been received in Nashville, the contract was abandoned, and complainant refused to deliver the remainder of the pipes. In consequence of this failure on part of the complainant, to comply with the contract of Joseph Anderson & Co., the corporation were compelled, in obtaining from others the pipes necessary to finish the water works, to give three and one half cents per pound, and were subjected to considerable loss by reason of the delay, consequent upon such non-fulfilment.

Steele, the complainant, is entitled to the benefit of the contract of Joseph Anderson & Co., and insists in his bill that he is entitled to the full value of all the castings that were delivered in Nashville, regarding them all as being of good quality, they having stood the proof stipulated in the contract.

It is insisted for the defendant, that the court of chancery

has no jurisdiction of the case, and if it has, that Steele is entitled only to pay for such pipes as stood the final proof of the hammer, and is liable for the excess of price the corporation paid to others, and for damages consequent upon the delay he produced, by reason of the non-delivery of the pipes in due time.

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1. The first question to be considered, arises upon the construction of this contract. Did the pipes become the property of the corporation so soon as they were delivered in Nashville? and had its agent a right, under the contract, to apply the test of the hammer, and reject the pipes, when about to lay them down?

The contract stipulates, that the pipes are to be proved by means of a hydraulic press, under a pressure equal to a column of water three hundred feet in height. If they stood this proof, and were found after a careful examination without any defects, they were to be marked by the agent of the watering committee, and transported to Nashville by the contractor; and were to be received by the watering committee at the Broad street wharf, if they were conveyed in boats, and if brought in wagons, at the place of deposit to be pointed out by the watering committee.

The pipes were not to be unloaded without giving previous notice to the watering committee or their agent, and they were at liberty to reject all the pipes at their arrival in the city, which were found defective, although they had been previously marked at the furnace. The payments were to be made in thirty days after the delivery of each parcel of pipes.

Taking all these stipulations into view, it seems clear that the parties contemplated no additional and severer test of the pipes than that stipulated in the contract, and that when the pipes were received in the city, they became the property of the corporation of Nashville.

This view of the contract will manifestly appear from the following considerations.

1. In the first place, it is unreasonable to suppose that parties who stipulated specially for a particular method of proving the article, which is the subject of contract, should

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contemplate another, and a severer test, which is not mentioned. If such were the intention, why stipulate for any test whatever? It would have been enough to have stipulated for a good article, with the right of rejecting such as were defective. This would have been subject to no misconstruction, and could have misled neither party. But the stipulation in the contract, that the pipes should be subject to a particular test, or mode of proof, is an exclusion of all other modes. It authorises the manufacturer to insist upon the reception of such an article, as will stand the proof agreed upon. He may have been willing to receive a price, which would by no means have been adequate for an article of the best quality, capable of standing the severest proofs.

2. All the pipes that stood the proof, were to be delivered by the contractor in Nashville. The delivery of these pipes in Nashville, was a heavy expense to the contractor. If it had been contemplated by the parties, that they were to be subjected to another proof, much more severe than the pressure of the water, is it not reasonable to suppose that test would have been applied at the furnace? In the nature of things, it must have been known to the engineer who wrote this contract, that many of the pipes which would stand the water, would not stand the hammer. If the hammer had been applied at the furnace, the rejected pipes could have been turned to some account by the contractor, but rejecting them at Nashville, in addition to the heavy expense of their transportation there, he was enabled to get less for them than one cent per pound. It is unreasonable to suppose the parties contemplated such a result.

3. The pipes were to be received at the wharf, if conveyed in boats, and if conveyed in wagons, at such place as should be pointed out by the agent of the watering committee, and in either case, the committee were to be notified of their arrival previously to their being unloaded. This is an express agreement to receive them when they arrive in Nashville. They were to be received as the property of the corporation, and as they ceased to be in the possession, or under the control of Steel, so his ownership of them ceased. The notice that the watering committee, or their agent, was

to receive, evinces that such was the understanding of the parties. They were at liberty to reject any of the pipes on their arrival at the city, that should be found defective. If they were to receive them at the wharf, it was indispensable that they should have notice of their arrival, in order that they might exercise the privilege of rejecting such as were found defective. Hence this stipulation for notice, and for the particular provision that it should be given before the castings should be unloaded.

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4. The payments were to be made in thirty days after the delivery of each parcel of pipes. This is an auxiliary circumstance to show, that the question of ownership was to be promptly determined, for if it were not known what pipes were received, and what rejected, within the thirty days, it would be impossible to make the payments.

5. But it is asked, why stipulate for the right to reject defective pipes, if they were to undergo no additional proof? The reason for this stipulation is most apparent upon the face of the contract, and is fully explained by Mr. Steine, the engineer, in his deposition, which the defendant has read in evidence. He says, "that he knew from long experience that sometimes it is difficult to find out blisters in pipes, and cracks at the small end, which defects are very often revealed by transportation." And he further says, that it was to guard against any injury the pipes might receive in the transportation of them from the furnace to Nashville, and any imposition that might be practiced in sending to Nashville pipes that had been rejected at the furnace, that the provision was introduced into the contract, that defective pipes might be rejected at their arrival at the city.

This explanation of the contract accords with the plain sense of the language the parties have used. Until the pipes were delivered in Nashville, they were to be in possession of the contractor; they might be injured by transportation; latent defects might be revealed, or imposition might be practiced; and hence the good sense of stipulating for a right to reject at Nashville. But none of these considerations contemplate any further and severer test. It is absurd to say, that the right to reject was reserved, because latent defects

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to contend, that the privilege existed to prove them with the hammer. If they were to be thus proved, it is manifest the latent defects which transportation would reveal, would be much more plainly revealed by the blows of the hammer. But if it were reasonable that the pipes should be at the risk of Steele so long as he had possession of them, it was equally reasonable that after he ceased to have any power over them, they should be at the risk of the defendant.

With these views, we think the watering committee had no right by the contract to reject any of the pipes after they had been received by them, or to refuse payment for them according to the terms of the contract, although upon the application of the proof of the hammer, they were found defective.

The next question is, whether the complainant is entitled to relief, and to what extent. The course which was pursued by the defendant in this case, having been in violation of the contract, and it having become manifest, by withholding the payments which by the contract they were bound to make, that if the complainant were to go on with the fulfilment of the stipulations on his part, he must not only be subjected to great delay in receiving payment, but that he would be involved in a doubtful and protracted litigation, it was the part of prudence in him to put an end to the contract. A court of equity will not require that a party to a contract shall go on, after it has been violated by the other party, in a ruinous fulfilment of it, on his part, in order that he may be enabled to prosecute an action at law, but will afford him such relief as to right and justice may belong.

In this view of the case there is no difficulty in maintaining the jurisdiction of the court. It is in fact the only forum in which he can obtain adequate relief, if he could obtain relief at all, in a court at law. Had he gone on to deliver all the castings, according to the contract, he might then have recovered at law the full price stipulated, but not having done so, and coming into this court to put an end to the contract, and move the conscience of the chancellor in his favor, he

can obtain so much only, as in conscience he ought to receive.

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The castings were for a particular purpose, and many of them were wholly unfit for that purpose. The method of proving the pipes agreed on in the contract, has nothing to do with the question of compensation in this court. It is preposterous for the complainant to come into this court, to be relieved from a technical objection to his recovery, and at the same time insist on his right to recover upon a technical stipulation in the contract, that which in conscience he has no right to receive. He can get here only the real value of the articles he delivered. Those that were rejected were unfit for the water works. The complainant has sold them, and we are bound to suppose he sold them for their full value. He is only entitled, therefore, to the value of those that were actually used at the price stipulated in the contract. For such only he may have an account and decree.

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The defendants insist that they ought to be allowed damages, for the difference in price they gave other contractors, and the price they were to pay complainant. To this they are not entitled. If the corporation violated the contract, and justified the complainant in the eye of a court of equity, to put an end to it, it follows that they are entitled to claim nothing from the complainant for his non-fulfilment of it. Neither party will recover costs.

Decree reversed.

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ALDERSON AND EDWARDS vs. CHEATHAM.

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Where a negotiable instrument has been endorsed for value, a subsequent failure of the consideration on which the note was originally given, cannot affect the right of the endorsee.

A executed a promissory note to B, the consideration of which, was the sale of an interest in lands granted by the Republic of Mexico; the grant required certain conditions to be performed within a specific time, which B was to go to Mexico and have performed. B, before the expiration of the time when the conditions were to be performed, endorsed for value, the note to C, who knew at the time, that the note was given for the above consideration. B subsequently died before the performance of the conditions: Held, that the consideration for which the note was originally given had failed, but the failure of consideration being subsequent to the endorsement to C, could not affect his right of recovery against A: Held also, that the above contract was valid, being neither *malum in se* nor *malum prohibitum*.

Frierson, for complainants.

W. A. Cook and Geo. S. Yerger, for defendant.

TURLEY, J. delivered the opinion of the court.

This bill of complaint charges, that certain persons residing in the town of Nashville, styling themselves and known and designated as the Ross Company, of Texas, and one William Arnold, held out and pretended that they had become interested in a certain pretended grant of land, which they fraudulently represented had been made by the government of Mexico to one Reuben Ross, for eighteen millions four hundred thousand acres of land, in the province of Texas, on the 17th day of May, 1828, the whole of which they pretended to have purchased from said Ross. That said company, pretending that it was essential to their interest that some person should be sent to the Mexican government for the purpose of obtaining a confirmation of the grant, constituted and appointed William Arnold their agent for that purpose, and in consideration for his services thus to be rendered, agreed with him that he should be entitled to receive one half of the number of acres contained therein. That said Arnold divided his interest in said grant into four hundred shares, of twenty three thousand acres each, for which he is-

sued scrip, which, by the advice, consent and management of the company, he placed in the hands of various irresponsible persons for sale, for the benefit of himself and company. That, among others, one Samuel Gillespie was appointed an agent for the sale of said scrip, who by false and fraudulent representations, induced the complainants jointly to purchase scrip for one share in said adventure, for which they executed their joint note to Wm. Arnold for the sum of two hundred and fifty dollars, bearing date the 25th day of November, 1832, and falling due the 1st day of January, 1835. That they would not have purchased said scrip but for the false statements and representations of the said Gillespie, who at and before said purchase, iniquitously stated to them as an inducement to make the purchase, that there would and could be no difficulty in obtaining the said land; that the same had been granted by the Mexican government to Reuben Ross, absolutely and unconditionally; that the title was perfect and unimpeachable, and that the only reason why the land had not long before been laid off, and possession taken by the said Arnold and the Ross company, was to be attributed solely to the death of Ross, in consequence of which, it became necessary for the company to send some person to Texas only for the purpose of having the boundaries of said grant run out, marked and established, which alone remained to be done in order to the perfect occupancy and enjoyment of said lands; that said William Arnold had a perfect title to one half of said grant of land, and would in a short time go to the province of Texas for that purpose, and that after having run out said grant, the boundaries of which he alleged were well known, the said Arnold would then divide the same between himself and the company, into equal shares, and after having so done, would also, while there, proceed to divide his portion into four hundred equal shares, and that the purchasers of scrip from him would draw for their number of location; all of which statements the bill charges to have been absolutely false, and so known to have been by Gillespie at the time they were made.

The bill further charges that no grant was ever made by the Mexican government to Ross for the land claimed, or that if such grant was made, it was totally different from that set

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forth and represented by said Gillespie and Arnold, being made upon condition that the said Ross should, within six years from the date of said grant, settle two hundred families within the limits of the grant, two thirds of whom should be Mexican subjects; and that shortly after the date of said grant Ross was murdered, without having transferred his interest (if any) therein, to said company, and without having done anything toward complying with the conditions of the grant, and that the six years, the time limited for its performance, had expired, after which the same land was granted to one Cameron, upon the same conditions.

The bill further charges, that the said Arnold, in the summer of 1833, started to the Republic of Mexico, but died shortly thereafter in the province of Texas, without having obtained any confirmation of said grant from the Mexican government, and that no attempts have been since made to do so, and all right which the company might have had to said grant, has been entirely lost.

The bill further charges, that the note executed by the complainants to Arnold, was endorsed to L. P. Cheatham, the defendant, on the 25th day of August, 1833, and that he had obtained judgment thereon against them, at the June term, 1835, of the county court of Maury, but that he was, at and before the time of the transfer, and still is a member of the Ross company, and was fully acquainted with all the facts charged in the bill, and knew all about the consideration of the note and the circumstances under which it was given, and that he paid no consideration for the transfer.

A copy of the scrip purchased from Arnold by the complainants, is attached to the bill as an exhibit, and is in the words and figures following:

“ROSS CONCESSION.

“Beginning at the point west, at which terminates the colony of General Arthur A. Neville, upon the Red River of Natchitoches; from thence running up the said river, on the south side thereof, with its meanders, passing the south-west corner of the Arkansas territory, to a point on said river where the 102d degree of west longitude crosses it; from thence south with said degree twenty leagues; from thence

east, parallel with said Red river, 220 miles to the west boundary of said Neville's grant; thence north with said boundary to the beginning, including eighteen millions four hundred thousand acres.

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"Whereas, a grant of land, in the province of Texas, was heretofore obtained from the Mexican government, by Reuben Ross of Tennessee, and certain persons in the town of Nashville, known and designated as the Ross company, became interested in said grant, and since the death of said Ross nothing having been done towards a confirmation of said grant in said company, and it being highly necessary that this object should be effected immediately, if possible; and whereas, the president and members of the Ross company have full faith and credit in the capacity and integrity of General William Arnold, of Tennessee: Now, therefore, it is agreed between the president and members of said company and the said Wm. Arnold, that the said Arnold shall proceed forthwith to any part of the Mexican Republic he may please, for the purpose of obtaining a confirmation of the grant issued to the said Reuben Ross on the 17th day of May, 1828, or of effecting such a modification "of said grant and such an extension of time as may be necessary to enable the company to realize the benefit" of said grant. And the said Arnold is hereby authorized and empowered to surrender said grant altogether if another equal to it can be obtained in its place, or to change or remodel it in such manner as he may think best, and to do and perform such other acts as he may deem necessary for the interest of said company. And for and in consideration of the services which the said Arnold may render in effecting the above objects, he shall be entitled to receive one half of the said grant, if it be confirmed, or the one half of whatever he may obtain.

In testimony whereof, the president and members of the Ross company and the said William Arnold have hereunto set their hands and affixed their seals, this 22d day of September, 1832." Signed and sealed by—"John Shelby, President, W. Barrow, John C. M'Lemore, Andrew Hynes, Robt. H. M'Ewen, Matthew Watson, James Vaulx, S. B. Marshall.

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"I have divided my interest in this concession into 400 shares, and the person or persons holding this scrip will be entitled to one share. Witness my hand and seal this 22d day October, 1832. Wm. ARNOLD, (*Seal.*)

The defendant answers and admits the assignment of the note, and that he obtained a judgment thereon as stated in the bill, and that at the time the note was assigned he did know that the consideration was the purchase of a share of Arnold's interest in the Ross grant, as charged, but denies that any fraud or misrepresentation was practiced, or intended to be practiced by the Ross company or William Arnold, in the sale to the complainants, and states that he believed the scrip, as exhibited by the complainants, contains a true statement of the facts in relation to the claim, as they were believed to exist by the company and William Arnold, and as they were stated to the complainants. He also denies that he was ever a member of the Ross company or had any interest in Arnold's sale of scrip, but says that he received the note in dispute, from Arnold in part payment of debts due for money paid for him as his endorser of different notes; he also admits that Arnold died in the province of Texas without having effected the object proposed by his mission to the republic of Mexico.

There is no proof in the cause: it was heard upon bill, answer and replication.

It is a well settled principle of equity jurisprudence that where a fraud is charged it must be proven. It is charged in this bill but it is denied in the answer, and there is no proof of its existence. That the fraudulent misrepresentations charged in the bill to have been made by Gillespie, the agent of Arnold, as an inducement for complainants to purchase the scrip, were never made, is evident from the facts specified on the face of the scrip itself. It shows that nothing had been done after the death of Ross towards perfecting a title to the grant, and that it was highly important that it should be done immediately, if possible, and that Arnold was to proceed forthwith to the republic of Mexico for the purpose of obtaining a confirmation of the grant, or such a modification thereof, and such an extension of time, as might be necessa-

ty to enable the company to realise the benefit expected to arise therefrom, and that he was empowered to surrender it altogether if another could be got, or to change or remodel it in such a manner as he might think proper. How is it possible that with these facts expressed in the evidence of the right about to be sold to the complainants, that the agent of Arnold could have said to them "that there could be no difficulty in obtaining the land, that the same had been granted by the Mexican government to Ross absolutely and unconditionally; that the title was perfect and unimpeachable, and that the only reason why the land had not been long before laid off, and possession taken by the company and Arnold, was to be attributed solely to the death of Ross, in consequence of which it became necessary for the company to send some person to Texas, solely for the purpose of having the boundaries of said grant run out, marked and established, and which alone remained to be done in order to the perfect occupancy and enjoyment of the land." The proposition is too absurd for belief. We are well satisfied that the purchase was understood by both the contracting parties to have been a hazard, where much might possibly be gained and but little lost, and that loss the purchasers were willing to risk in consideration of the chance of the gain. Surely no one can suppose that two hundred and fifty dollars would have been received in payment for a certain interest in twenty three thousand acres of land. That the condition upon which Arnold was to have his interest in the grant was never performed by him can make no difference in the case now under consideration, however much it might if he were defendant, because it only amounts to a failure of consideration, which having taken place after the assignment of the note to the defendant, Cheatham, cannot affect his previously acquired rights. The only question then is, whether the contract was in its inception void, which it certainly was not, because there was nothing in it either *malum in se* or *malum prohibitum*. We therefore reverse the decree of the court below and dismiss the complainants bill.

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Decree reversed.

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M'NAIRY vs. EASTLAND *et al.*

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By the provisions of the act of 1809, c 69, where a judgment is rendered against two or more sureties, they may, before payment thereof, obtain a joint judgment on motion and without notice, against their principal, but a separate judgment by each for the whole debt, is unauthorised by the act, and is void.

Courts of chancery in Tennessee, have jurisdiction to vacate and enjoin proceedings on a void judgment.

A surety who has paid the judgment against his principal, is substituted in equity to all the rights of the judgment creditor, nor need the judgment creditor in such case, where a bill is filed by the surety, be a party.

A creditor by judgment, may file a bill in chancery to subject the equitable interest of his debtor in real estate to the satisfaction of his judgment, without having first issued an execution, or procured a return thereon of "*nulla bona.*"

But where an equitable interest in personal property is sought to be subjected, an execution must issue and be placed in the hands of the sheriff of the county where the equitable assets were situated.

In regard to equitable real estate, the judgment creates the lien in equity; in regard to equitable personal estate, the issuance of the execution forms the lien, and the true principle upon which chancery assumes jurisdiction in such cases is. to enforce the equitable lien which is thus created.

The bill, cross bill, answers and proof in these causes, raised several questions, the principal of which were,

1. Whether M'Nairy could be substituted in equity to the rights and remedies of Oxley, who had obtained a judgment against Eastland as principal, and M'Nairy and others as his sureties, which judgment M'Nairy paid before he filed this bill, and whether, in such case, Oxley should be a party.

2. Whether one of several sureties, against all of whom judgment was rendered, could, without payment of the said judgment, obtain a judgment on motion against the principal debtor, by virtue of the provisions of the act of 1809, c 69.

3. Whether equitable real estate could be subjected in equity to the satisfaction of a judgment against the owner thereof, without an execution having issued thereon, and been returned "*nulla bona.*"

The chancellor dismissed M'Nairy's bill, from which decree he appealed to this court.

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F. B. Fogg and R. J. Meigs, for complainant, contended that as M'Nairy certainly paid \$1250, on account of his liability as Eastland's surety, any equities which Eastland may have in real estate, ought to be made liable in this suit to the satisfaction thereof. This bill is substantially an application by a surety for relief; and an exact correspondence between the *allegata* and *probata* will not be required, it appearing in fact, that the surety paid money for the principal, though not so much as he alleges.

Admitting the judgment on motion to be void, still Oxley could have subjected this property to the satisfaction of his judgment; and it is a familiar principle, that equity holds the surety who has paid a debt, entitled to stand in the condition of the creditor. 1 John. Ch. Rep. 413: Story's Eq. § 633: 4 John. Ch. Rep. 129, 130: *Rhodes and Kelly vs. Crockett and Adams*, 3 Yer. Rep.: 3 Paige's Rep. 614: 1 Paine's Rep. 525.

To subject equitable personal estate, the issuance of an execution is necessary, because the execution and not the judgment creates the lien; but in regard to equitable real estate, the judgment is sufficient, because it is the judgment that gives the equitable lien upon land. *Wiggins vs. Armstrong et al.* 2 John. Ch. Rep. 144, and authorities cited: Coopers Eq. 149: *Angel vs. Draper*, 1 Ver. Rep. 399, and Raithby's notes: *Shirly vs. Watts*, 3 Atk. 200: *Hendricks vs. Robinson*, 2 John Ch. Rep. 296: 4 John. Ch. Rep. 675: 3 Binney's Rep. 4: Nelson's Ch. Rep. 87: 1 Ch. Cases, 35.

A judgment being inequity a lien upon equitable real estate, may be enforced against a subsequent purchaser, with notice. 2 Ch. Cases, 480: Sugdon on Vendors, 317: 2 Ch. Cases, 170.

W. A. Cook and W. Thompson, for complainant. The first point we make in support of the chancellor's decree is, that supposing every thing else to be in favor of complainants, he has shown no execution returned, "no property found," on either of the judgments. This defect of proof is deemed de-

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cisive. A court of equity will not lend its aid until legal process is exhausted by a return of "*nulla bona*." The court will receive no other evidence that the defendant has no legal estate, or has exhausted his remedies at law. *Beck vs. Burdet*, 1 Paiges Ch. Rep. 305, 309: *Edmondson vs. Lyde and Walton*, 1 Paige's Rep. 637.

The next objection is, that this judgment by motion is void on its face.

It does not appear on the face of the judgment that M'Nairy had paid the amount of Oxley's judgment, therefore this judgment cannot be supported by the act of 1801, c 15, § 6.

It cannot be supported by the act of 1809, c 69, § 1, for that act gives a joint judgment in favor of all the securities where there is more than one, for the whole amount of the judgment, and not separate judgments in the name of each security.

This *exparte* judgment then being not authorised by law, is irregular and void, and cannot be enforced in equity.

The claim of substitution cannot be sustained, because there is no allegation in the bill that an execution has been returned "*nulla bona*" on it; and because Oxley is not a party.

REESE, J. delivered the opinion of the court.

The bill is filed to have a discovery of certain equitable real estate of Thomas Eastland, and satisfaction out of the same, of a judgment obtained by the complainant, against Eastland, as the bill alleges, in the county court of Davidson, in the year 1832, for \$3438 25, "it being for money recovered by Joel Oxley against said Eastland, and a certain William M'Laurin and the complainant, as his securities, in the year 1824." The bill charges that complainant caused an execution to issue upon this judgment, that certain chattels of defendant Eastland were levied on and sold, and the sheriff returned "*nulla bona ultra*." The bill then describes certain real estate, of which the legal title is alleged to be in defendant John W. Simpson, but the equitable title in defendant Eastland, and a sale of the equitable property is prayed for.

The defendant Eastland answers, that in 1818, he became together with one Stump, appearance bail for one Bakewell,

in an action brought against the latter by Joel Oxley, that subsequently, for the non-appearance of their principal, a *scire facias* was sued out against the bail. Defendant supposed that he had discharged himself by the surrender of Bakewell, but judgment having been rendered against him, he without said Stump joining therein, prayed an appeal, and gave as his sureties therefor, the complainant and the said M'Laurin, and that Oxley in the supreme court obtained judgment against the defendant and his sureties, complainant and M'Laurin. That afterwards the complainant filed a bill and obtained an injunction, which upon a compromise between Oxley and complainant was made perpetual, except as to the sum of one thousand dollars and costs, amounting to \$250, and these amounts constitute all which the complainant has been compelled to pay as his surety. That defendant is not liable to refund to him that amount, because when he became surety for defendant, there were balances due from him to defendant, on the ground of a pre-existing mercantile copartnership, which by agreement at the time of his becoming surety, were to remain in his hands as an indemnity against said suretyship. The answer also insists that the judgment set out in the bill, and upon which the execution had been issued was void, because taken without process or notice, and without the payment by complainant, of the money recovered in said judgment.

All the statements and allegations in this answer contained, were subsequently set forth in a cross bill filed by defendant, Eastland, against complainant, M'Nairy. To this cross bill, M'Nairy answered that the sum of \$1000 for debt, and \$250 for costs, in the case of *Oxley vs. Eastland, M'Laurin and himself*, and in his case *vs. Oxley* in chancery, was the whole amount which as Eastland's surety he had been compelled to pay—that it is all which he claims from Eastland, with interest upon it, and that the judgment for more was taken by his counsel, he supposes by mistake. He denies the allegation that he was indebted to Eastland for balances due on the ground of their mercantile co-partnership, and he denies the alleged agreement that such indebtedness on his part was to continue with a view to his indemnity; and he denies that he has been in any way indemnified, and pleads the statute of limitations

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NASHVILLE, as to the account sought to be had in regard to said mercantile transactions, which had been closed by settlement.
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The first question which claims our consideration is, whether the judgment of the county court of Davidson for the sum of \$3438 25, mentioned in the bill and set out in the proofs, be void or only voidable; and we think the judgment void. It is not authorised by the act of 1801, because it does not purport to have been rendered on the ground that the surety had paid the money, upon which ground alone that act gives the motion to the surety. It cannot be maintained by the provisions of the act of 1809. That act indeed gives to a surety against whom a judgment may have been maintained, the summary remedy of a motion over against his principal without a previous payment of the money, and upon the mere ground of the rendition of the judgment against him. The remedy furnished by this statute is, perhaps, peculiar to Tennessee; it is without notice, summary and contrary to the course of the common law, and of that character therefore, with reference to which this court has so often declared that it must pursue the provisions of the statute; that the proceeding upon its face must show that the case comes within the statutory requirement, or that the court will be without jurisdiction. This judgment was rendered in favor of one surety, when it is shown upon the face of the proceeding that there was another, namely, M'Laurin, who was surety also, and against whom likewise the original judgment had been rendered. To permit the creditor to obtain his judgment against the principal debtor, and against a numerous train of sureties, and then to suffer this numerous train of sureties, without any payment of the money, to recover over against the principal debtor, each one for himself a separate judgment for the whole amount of the judgment so rendered, would produce an oppression and harrassment of the principal debtor, the most startling and monstrous. Such, however, is the principle of the course attempted in this case, under the act of 1809, a principle which cannot receive our sanction. This being our opinion, and this court having heretofore determined that a court of chancery has jurisdiction to vacate and enjoin a void judgment, it would be our duty, if this were all that belonged to the case, not only to dismiss the

bill of the complainant, but to give the relief by Eastland prayed for in his cross bill, and to set aside, vacate and enjoin all proceedings upon the judgment of the Davidson county court in the pleadings mentioned.

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But we are of opinion that in giving to Eastland, upon his cross bill, the relief by him prayed for, as against said judgment, we cannot overlook the fact that the pleadings upon the cross bill and the proof applicable to it, establish that M'Nairy as the security of Eastland, has been compelled to pay \$1250, and that he has received no indemnity as was insisted. And is he not intitled therefore, here to a decree for that amount? Why should he not receive at our hands such a decree? Can there be any doubt of the jurisdiction of the court as to the case made in the cross bill? and will the fact of its being a cross bill make any difference? Will not the same consequences follow as regards the question of jurisdiction, as if an injunction bill on the part of Eastland without any original bill on the part of M'Nairy had been filed, and the same pleadings and proof as in this case had followed thereon? Would this court in such case, vacate as being void, the judgment in behalf of M'Nairy, and yet refuse to decree to him as surety against his principal, the \$1250, to which the admissions of the bill, the allegations in the answer, and the testimony of witnesses so fully entitle him? We think it very clear that to such a decree at all events, M'Nairy has a right.

But it is urged by his counsel, that he is entitled to a sale of the equitable real estate as prayed for, because conceding that the judgment on motion is void, still, as M'Nairy, in the character of surety, was compelled to pay to the creditor, Oxley, upon his judgment against Eastland and his sureties, the sum of \$1250, he has a right in equity to be substituted for Oxley, and to have the use and benefit of his judgment against Eastland, and all the means of satisfaction depending upon said judgment and consequent upon such substitution. The counsel of Eastland not calling in question the general right which a surety has, upon payment of the debt, to be substituted to the creditor's rights, and to have the benefit of his judgment, as against his principal, yet deny that in this case upon such ground the complainant can entitle himself to the relief prayed for in the bill.

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1st. Because it is said that the bill is not framed with a view to such a substitution, and no such purpose was in the mind of the draftsman. This is obviously so. But still, all the facts upon which such right of substitution would arise are distinctly stated in the pleadings, and when that is done, it matters not, in the view of a court of chancery, that such statement of facts may have been made with the purpose and belief, that the wished for relief might flow from a totally different source of equitable jurisdiction.

2d. It is said that in order to give M'Nairy the benefit of such substitution, it is necessary that Oxley, the judgment creditor, should have been made a party. Situated as is the present case, Oxley is not a necessary party. M'Nairy, the surety, filed his bill and obtained an injunction against the original judgment, and that judgment, except the sum of \$1000, was perpetually enjoined, and the proof from the sheriff and the record are very satisfactory that Oxley has been paid. Why make him a party? To contest the mere question of payment so satisfactorily proved, and not contested, even by Eastland himself? He has received his money; the decree can in no way affect him—as to him the whole matter is *res inter alios*.

3d. But it is said, that if the frame of the bill and the statement of facts be such as to allow of this substitution, and the creditor Oxley be not a necessary party, still the substitution will avail nothing in giving the relief in the bill prayed, because Oxley himself having been only a judgment creditor of Eastland, and having never issued an execution or procured a return of *nulla bona*, would not himself have been entitled to the relief sought, and of course M'Nairy will be entitled to nothing more. This raises the important question, whether a judgment creditor can, on the ground of the lien of his judgment upon the lands of his debtor, go into a court of chancery to seek satisfaction out of the equitable real estate, without having issued his execution or procured a return thereon of *nulla bona*? It is frequently said, that in these cases, a court of chancery lends its aid to a court of law, exerts a jurisdiction which is merely of an ancillary character, and that therefore the party plaintiff who invokes this aid, must show to the

court with a view to its jurisdiction, that he has exhausted his legal remedies. Generalities of this sort, which with reference to so many cases, are founded in truth, sometimes come to be taken by frequent repetition as axioms, behind which, as a bulwark, we seldom in any case look. As a question affecting merely the jurisdiction of a court of chancery, it is believed that the principle traced to its origin will be found to be this, that a creditor who goes into a court of chancery to obtain satisfaction of a merely legal demand, must show that he has proceeded to such extent at law as to give him title to proceed in equity; that, in the earlier cases seems to have been, that if satisfaction was sought to be obtained out of equitable title in personal assets, not only a judgment but an execution issued, and put in the hands of the sheriff in the county where the equitable assets were situated, were held to be necessary. The actual issuance of the execution and its reception by the sheriff in the proper county, were necessary to give a lien, and the lien authorised the party having it to go into chancery. So if the creditor sought to obtain satisfaction of his legal demand out of equitable real estate, he must obtain a judgment at law, for in such case it is the judgment, and not the issuance of an execution which confers a lien on real estate, and having such judgment and lien, the creditor might pursue the equitable real estate in chancery.

In the first case on this subject, 1686, *Angel vs. Draper*, personal property was sought by the judgment creditor. A demurrer to the bill was sustained, "because the plaintiff had not alleged that he had taken out execution, for until he had done so, the goods were not bound by the judgment; nor the plaintiff entitled to a discovery on account thereof." 1 Vern. 206. So also in the case of *Shirley vs. Watts*, 3 Atk. 200. A judgment creditor who had not taken out execution, brought a bill against the defendant to redeem him who was a mortgagee of the leasehold estate, and likewise a bond creditor, and the Master of the Rolls decreed that the bill must be dismissed, "because till execution, the plaintiff has no lien on the leasehold estate.

It is obvious that both these cases show that a lien on the equitable property sought in satisfaction, is necessary to enable

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a plaintiff to pursue it in a court of chancery, and that a judgment does not create this lien upon personal chattels or leasehold interest in land, which is personal estate; but if it had been a freehold interest, the lien of the judgment would have been sufficient. This is asserted by Mr. Coventry, the learned annotator of the Treatise of Powell on Mortgages, who in a note 282, remarks that there "are some few passages in the works of learned writers, which have a tendency to confuse the student." Among these he enumerates the following: "Many books use this language, a judgment creditor may redeem, having previously sued out a writ of execution. See Fon. Tr. on Eq. 269, and 1 Mad. Ch. 522, (2d Ed.) Now, with respect to a mortgage in fee and a mortgage for years of freehold property, no writ of execution is necessary to entitle the creditor to redeem; it is to the redemption of a leasehold estate only, that a writ of *fiery facias* is essential. In the case of *Brinkerhoff vs. Brown*, 4 John. Ch. Rep. 677, which was a case with regard to personal property chiefly, Chancellor Kent says, "I find the rule to have been long and uniformly established, that to procure relief in equity by a bill brought to assist the execution of a judgment at law, the creditor must show that he has proceeded at law to the extent necessary to give him a complete title." "If he seeks aid, adds Chancellor Kent, as to real estate, he must show a judgment creating a lien upon such estate; if he seeks aid in respect to personal estate, he must show an execution giving him a legal preference or lien upon the chattels." He then refers to the cases of *Angel vs. Draper*, and *Shirley vs. Watts*, before remarked on, and seems to think although the issuance of an execution with regard to personalty, constitutes in the opinion of some judges, without more, the requisite lien, yet the good sense of the thing would be, to require a return of the execution, showing what had been done under it." In the case before him, no execution having been issued and returned, the bill was dismissed. In that case, land was mentioned in the pleadings, but the chancellor with regard to that said: "It lies open for sale, according to the course of the courts of law." It is very clear that if the land in question had been held by equitable title only, it would have been determined by the chancel-

lor so far as related to that, that a judgment only and not an execution was necessary.

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Again, in the case of *M'Dermott vs. Strong*, 4 John. Ch. Rep. 692, the same able and learned judge lays down the rule on the same subject to be, "that an execution creditor at law, has a right to come here and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate, and that the party so redeeming will be entitled in either case to a preference according to his legal priority." The supreme court of South Carolina, in the case of *Perry vs. Nixon*, 1 Hill's S. C. Rep. 335, says, "that before a creditor seeking relief touching the personal assets of his debtor, can come into this court, he must show not only a judgment and execution, but that he has pursued his execution at law to every available extent," and then the court quote and approve the rule laid down by chancellor Kent in the case of *Brinkerhoff vs. Brown*, 4 John. Ch. Rep. 677, already quoted by us.

We take the law to be, therefore, that a judgment creditor, when seeking satisfaction upon the ground of his lien, out of equitable real estate, need not in order to confer upon the court of chancery jurisdiction, issue an execution at law or procure a return of *nulla bona*; and indeed, upon principle we would ask, why issue and return an execution? It is not necessary, as we have seen, in order to create the lien—that is done, not by the execution but by the judgment. Is it to show that the legal remedy has been exhausted? The return of *nulla bona* or "no goods," would not have that effect, for there may have been legal estate in lands—and however frequently in bills of this description, it may have been averred that there was no land remaining subject to execution at law, we apprehend that no one has decided or perhaps contended that the return of such fact upon an execution, or the averment of it in a bill, is necessary to the maintenance of the jurisdiction of the court. It can hardly be supposed, indeed, that in any case a plaintiff who could at law by the mere force of an execution, obtain a satisfaction of his judgment out of personal assets or legal estate in lands, would choose to incur the certain expense, trouble and delay of seeking in a

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court of chancery after equitable assets or real estate. If it appeared in any case that the jurisdiction of the court was thus capriciously resorted to, we would not say, that chancery would not stay its hand and direct the plaintiff to seek his satisfaction by execution at law. In the case before us, it is admitted by the answers both of Simpson and Eastland, that the latter defendant has no other property than the equitable real estate in the pleadings mentioned.

The result of our opinion therefore is, that the judgment of the county court of Davidson, of 1832, in favor of complainant against defendant Eastland, in the pleadings mentioned, is void, and that the same be vacated; that, however, the court has jurisdiction upon the issue and proof in the cross bill to decree the \$1250, in the pleadings mentioned to be paid by Eastland to M'Nairy, and lastly, notwithstanding the frame of the bill and the omission to make Oxley a party, that complainant is entitled to be substituted to the right of the judgment creditor, Oxley, to the extent of the amount of said judgment paid to Oxley by M'Nairy, and that the effect of such substitution is, upon the lien of said judgment, to enable the complainant to maintain this bill to subject the equitable real estate mentioned, to the satisfaction of Oxley's judgment.

Decree reversed.

WATKINS, *et. al.* vs. DEAN, *et. al.*NASHVILLE,
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An instrument, which does not purport to convey any property of which the maker was owner, at its date, but gives "the one half of all the property of which he may die seized and possessed, is, although in the form of a deed, testamentary in its character, and only operates and takes effect as a will.

The act of 1827, c 14, which gives to widows the one half of the personal estate of their husbands, where the husband dies without child or children, only applies to cases of actual intestacy. If he dies and leaves a will, she cannot, by dissenting, become entitled to one half, but only to one third, as provided by the act of 1784, c 22.

Michael Dean, of Warren county, having no legitimate children, but having a natural daughter, the complainant Hannah, for the purpose of making a provision for her during her life, and her children after her death, on the 6th day of November, 1833, executed and duly acknowledged before the clerk of the county court of Warren, an instrument, whereby in consideration of natural love and affection for his said daughter, and for the purpose of making the provision before mentioned, he "gave, granted, conveyed, enfeoffed, set over and confirmed to Eleanor and Mary Jane Watkins, two of the children of the said Hannah, one half of all the property, real and personal, and moneys, of which he might die siezed or possessed, to have and to hold to the said parties, Eleanor and Mary Jane and their heirs and assigns for ever. In trust nevertheless, for the exclusive support and maintenance of said Hannah, during her natural life, and also upon the further trust, that all and every other child born of the body of said Hannah, between the date of said indenture and her death, should have an equal portion of said property with said Eleanor and Mary Jane; and also upon this further trust, that at the death of said Hannah, all the property should be equally divided between said Eleanor and Mary Jane, and all other children of said Hannah, born or to be born. And then the instrument concludes with a covenant, that the donees shall take the property free from all and every gift, &c. made or to be made, &c., and that they, their heirs and assigns, shall have, hold and enjoy the same, in the manner above stated,

NASHVILLE, free from the claims of him, the said Michael, and his heirs,"
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This instrument was duly registered on the 20th of July, 1834. In 1835, said Michael Dean died intestate, and at the January sessions of the county court of Warren, in the same year, administration of his estate was granted to his widow, the defendant, Lucy.

On the 1st of May, 1836, said Hannah and her two daughters, Eleanor and Mary Jane, and two other children born after the date of the instrument, by their next friend, Henry Watkins, husband of said Hannah, and father of the other complainants, filed this bill, setting forth the said instrument, and praying for partition of the real and personal estate between them and the widow and heirs of said Michael Dean, all of whom were made parties.

Lucy Dean, the widow, treating the instrument as a testamentary paper, prays leave to dissent from it, and claims one half of the estate, under the act of 1827, c 14. The bill was taken for confessed, against some of the heirs. Those who answer insist, that the said instrument is void; that the widow must take under the act of 1784, c 22; and that they are entitled to all the residue of the property.

The chancellor, believing the instrument ought to be regarded as a testamentary paper, and if so, that it had not been executed so as to pass land, decreed that the widow might dissent; that she was entitled, under the act of 1784, to dower, and one third of the personalty, and that the complainants were entitled to one half of the personalty; but that the other defendants, the heirs at law, were entitled to the other two thirds of the real estate.

The widow appealed, because she thought she ought to have been allowed to take one half under the act of 1827, c 14.

R. J. Meigs, for complainants. Mrs. Watkins and her children insist, that the instrument is sufficient to pass the interest intended by Michael Dean; and that the chancellor ought to have decreed them one half of all his estate, real and personal. The instrument is not testamen'ary—although

the court would so consider it, *ut res magis valeat quam pereat*. But there is no necessity for so considering it.

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Here are sufficient words to raise a trust, a definite subject, and a certain and ascertained object, the three things said to be indispensable to constitute a valid trust. 2 Story's Equity, § 964.

The language need not point out the very nature, character, and limitations of the trust in direct terms. It is sufficient if the intention to create it can be fairly collected upon the face of the instrument from the terms used. 2 Story's Eq. § 980.

The want of a trustee will not cause the trust to fail; equity will follow the legal estate in the hands of the heir and make him execute it. 2 Story's Eq. 976.

This instrument may be regarded as equivalent to a conveyance to trustees to the use of Michael Dean for life, remainder to Hannah Watkins for life, remainder to her children in fee. It creates an express trust, after his death, for Hannah Watkins and her children, and a resulting trust to himself for life.

S. Laughlin, for the heirs at law of Michael Dean. In this case it is respectfully insisted for the heirs at law of Michael Dean, that to make the paper writing of the 6th of November, 1833, operate as a gift, the court will, as in the case of *Caines vs. Jones*, 5 Yer. 252, and *Caines and Wife vs. Marly*, 2 Yer. 582, have to reject the proviso, that the gift should not take effect until after the death of Michael Dean, the donor. To constitute a gift, the title must pass *in presenti*; and nothing is a gift that does not. 2 Kent, 438. If this instrument operates as a gift, it passed the title to one moiety of the donor's estate to the trustees named immediately upon its execution on the day of its date. Michael Dean died in 1835, and consequently was not possessed of the property mentioned in the deed as of his own right at the time of his death, and consequently, as to that property, the widow is not entitled to dower or portion; and then the division of the property, under the act of 1827, Stat. Laws of Tenn. 253, must be made thus: the half of

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from the whole amount, and one half of the remaining moiety be given to the widow, and the remainder to the heirs at law.

It is secondly insisted, that the writing of the 6th of November, 1833, does not constitute a gift; that it is merely a testamentary paper. A will is "a disposition of property to take effect after the death of the testator." 4 Kent, 501. The deed here was not to take effect until after the death of Michael Dean. In this respect it is a will and not a gift. The calling it an indenture, a deed, &c. does not change its effect and constitute it a gift; for a will is as good by those names as by any other. Swinb. 522. It is a universally admitted principle, that an instrument, whatever its form may be, whether that of an indenture, or of a bargain and sale, or release, is testamentary if it is not to operate until after the death of the party who makes it. 1 Roberts on Wills, 145: *Rigden vs. Vallier*, 2 Ves. Sen. 258: 2 Ves. Sen. 216.

In making wills, the testator has the right of disposing of the property or revoking at pleasure till his death; so in the present case, no definite property, or certain quantity of property being given, but indefinitely, "one half of what the party might have at the time of his death," clearly leaves it in the power of Michael Dean to use, spend, wear out and exhaust the whole of it during his life. He gave nothing present, but only "a half of what he might have at the time of his death;" not giving any part of what he then had, or any control over any property he then had, or any present interest in the same, or any immediate right to it. This is the true ground of the difference between a will and a gift as settled by the cases above cited in 4 Kent, 438, and 2 Ves. Sen. In these important and essential respects this case differs materially from that of *Caines vs. Jones*, in 5 Yerger, 252: and *Caines and Wife vs. Marley*, 2 Yerger Rep. 582. In the former case, Wright, the donor, gave an immediate interest in a particular tract of land, leaving nothing uncertain and contingent, reserving to himself a life estate, but conveying a tangible present interest. In the latter case specific negroes were given. If these positions are correct, the pre-

sent instrument is either a will, or it is of no validity at all. As a will, it is not sufficient to pass the real estate, not being subscribed and attested by two witnesses. Two witnesses are required to a will to pass land. Stat. Laws Tenn. 706.

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If the instrument is testamentary, as is contended, Michael Dean did not die intestate; so that the widow's claim does not come within the provisions of the act of 1827, which only applies to cases of intestacy, where there are no legitimate children or heirs. She must therefore take under the act of 1784, c 22: Stat. Laws, 253, and is entitled to one third of the remaining half of the personalty, and one third of the land, and the other two thirds to the brothers and sisters of Michael Dean, or their heirs. The instrument being a will, is good to pass personalty, and consequently passes a moiety of the personal estate to the complainants.

J. Campbell, for the widow of Michael Dean, insisted, the paper or instrument was merely testamentary, as the authorities cited by Mr. Laughlin proved. If so, the widow by dissenting, as provided for and authorised by the act of 1784, c 22, will be entitled to such share of the estate as the law would vest in her, if her husband died intestate, which, if the husband dies without leaving legitimate children, is, by the provisions of the act of 1827, c 14, one half of the personalty, and by the act of 1784, c 22, one third of the realty for life. It is true, the act of 1827 says, she shall be entitled to one half, where the husband dies intestate, without children, &c. But by the act of 1784, c 22, when the widow dissents, the husband as to her does die intestate.

GREEN, J. delivered the opinion of the court.

On the 6th of November, 1833, Michael Dean, of Warren county, executed a paper writing, which he calls an indenture, to Eleanor and Mary Jane Watkins, in which he recites that they are the children of Hannah Watkins, wife of Henry Watkins, who is his natural daughter, that he is far advanced in life, and has no legitimate children, and has considerable property, real and personal; and for the purpose of making provision for his said daughter during her life, and for her children after her

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death, he "doth give, grant, convey, and enfeoff, set over, alien and confirm, and by these presents, he the said party of the first part, does for the purposes and considerations aforesaid, give, grant, set over, alien, enfeoff, confirm and convey to the said parties of the second part, to have and to hold to them their heirs and assigns, one equal moiety or equal half of all the property that he the said party of the first party may die seized or possessed of, whether in law or equity, or in possession, or in action, including all lands, tenements and hereditaments of what description soever, and also all negro slaves of what description soever, whether in possession or action. And also all moneys that he may be possessed of, or may be due him from any source whatsoever, and also one equal half of all the live stock of what description soever, that he may die seized or possessed of; and also, one half of every thing of what nature soever that he may die possessed of, or that may be due him in any way whatever, at the time of his death, to have and to hold to them, the parties of the second part, their heirs and assigns for ever." He then stipulates that the property is to be held in trust for the exclusive support and maintenance of the said Hannah, during her natural life; and upon the further trust, that every other child born of the body of said Hannah, should have an equal portion of said property, with said Eleanor and Mary Jane, at the death of said Hannah, when it was to be equally divided among all her children.

The instrument was acknowledged before the clerk of the chancery court at McMinnville, the same day it was executed, and on 22d of July, 1834, it was registered in Warren county.

In 1835, Michael Dean died, intestate, and administration of his estate was granted to the defendant, Lucy, his widow. Mrs. Watkins and her children, by their next friend, Henry Watkins, bring this bill to have partition of the real, and distribution of the personal estate.

1. The first question arises upon the construction of this paper. Can it take effect as a deed, or must it be regarded as testamentary in its character? A deed must take effect *in presenti*. 2 Kent's Com. 438. But this instrument, by its

terms, was to take effect at the death of Michael Dean. It does not purport to convey any property of which he was the owner at its date, but gives the one half of all the property of which he may die seized and possessed. It is most clear therefore, that it could not pass to the donees, any property owned by the old man at its date. As therefore it was to take effect only at the death of Michael Dean, it is a will, and not a deed. Roberts on Wills, 145. Viewing it as a will, it is not executed so as to pass land, not being subscribed and attested by two witnesses. The complainants are therefore entitled to one half of the personal property only.

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2. The defendant Lucy, the widow of Michael Dean, treating the aforesaid instrument as a testamentary paper, prays leave to dissent from it, and claims one half the estate under the act of 1827, c 14.

The widow has a right to dissent, and claim the provision the law makes in such cases. But we do not think she can take the one half under the act of 1827. That act provides, that where a man may die intestate, and without child or children, his widow shall be entitled to one half his estate. It means, what its words obviously import, not that the widow by dissenting from his will, under the act of 1784, c 22, thereby creates, as to her, an intestacy under the act of 1827. The latter act intended to give her the one half in one case only, where the husband, having no child, had not made any disposition by will of his estate, but it did not intend to prevent him from giving it, as before, to whomsoever he might choose, or to enlarge the rights of the widow, in case he made a will, beyond the provisions of the act of 1784. If the construction contended for were correct, the same result would follow a dying with, or without a will, and the use of the word intestate, would be wholly unnecessary and senseless. But it is manifest the legislature intended the word intestate to be operative and to have effect, which it would not do, if the construction contended for were sanctioned by the court. The widow in this case is only entitled to dower in the land, and to one third part of the personal estate.

The other defendants, heirs at law of Michael Dean, are

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Decree affirmed.

OVERTON vs. PERKINS.

Where personal property is levied on by the sheriff, he may sell after the return day of the execution, without a *venditioni exponas* or other process.

But where an execution is issued and levied on land, but the land is not sold on or before the return day of the writ, the sheriff cannot after the return day sell the land, without a *venditioni exponas*.

Land was levied on but not sold before the return day of the execution. The debtor afterwards died; a *venditioni exponas*, issued after the debtor's death, directing the property to be sold, but no *scire facias* or other process had issued to make the heirs or personal representatives of the debtor parties: Held, that the *venditioni exponas* was void, and communicated no power to the sheriff to sell, and that equity would enjoin the sale.

For the facts of this case, see the opinion of the court.

F. B. Fogg, for complainant.

Geo. S. Yerger, for defendant.

GREEN, J. delivered the opinion of the court.

In 1809, William Thomas obtained a judgment in Davidson county court, against George Walker, for about \$500. In 1810, an execution issued and was levied on a tract of land in Williamson county, belonging to said Walker, but said tract of land was not sold. After the said levy and return of the execution, Walker died. Several years after the death of Walker, a *venditioni exponas* issued to the sheriff, commanding him to sell the land levied on as aforesaid. No process has issued against the personal representative, heirs, or tertenants, since the death of Walker. The complainant

Perkins purchased the land from Walker, received a deed and took possession, but his purchase was made after the rendition of Thomas' judgment. Overton is assignee of the judgment against Walker in favor of Thomas. This bill is brought to enjoin the *venditioni exponas* on the ground that it is void.

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This cause has been twice argued before us with great zeal and ability, notwithstanding which, after the most elaborate investigation and mature reflection, on the part of the court, we feel that it is far from being free from difficulty.

The first question that presents itself is, whether after an execution has been levied on land and returned, but the land not sold on or before the return day of the execution, the sheriff can proceed to sell the land without other process. Nothing is better settled, than that a sheriff who has levied on goods may sell them after the return of the writ, and even after he goes out of office, without a *venditioni exponas*.

It is earnestly and forcibly argued for the defendant, that the sheriff has the same powers in relation to land, that he has over goods upon which a levy has been made. That by the act of George the Second, lands were subjected to the payment of debts; and the act of 1777, authorised the *feri facias* to run against lands as well as goods, and that there is no distinction, either as to their liability, or the sheriff's power over them. We do not think that the conclusion to which counsel arrive, follows necessarily from the premises. The very nature of the property creates a legitimate ground of legal distinction in relation to the powers of the sheriff. Goods are moveable, and capable of being taken by the sheriff into possession. They are liable to be wasted in the hands of the debtor, and hence the policy of the law in requiring the sheriff to take them in his possession. As possession of goods indicates ownership, and is in fact part of the title to them, it follows, that the sheriff would acquire by his levy and possession, a special property in them. Having thus deprived the general owner, the debtor, of the possession of his goods, the execution is satisfied by the levy, if the goods were of value equal to its amount. With all these legal consequences resulting from the levy on goods, it

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to sell them after the return of the execution. Although the return day of the execution has passed, yet he may make the sale; not because he has made the levy only, but also because he has a special property. The special property he has in the goods must be the principal reason why he can exercise this power. For he may sell, although he has ceased to be sheriff. The power to do so, does not exist by reason of his official character, for he has ceased to be an officer, not because of any legal process, for he has none, and that which he had is *functus officio*. To what principle then arising out of his connexion with the subject can this extraordinary power be traced, if it be not mainly to the one before stated, his special property in the goods. It is true it is not by virtue of this special property alone that he sells, for if that were so, he would, as contended by defendant's counsel, convey only his special property to the purchaser. The law has placed the property in his possession, by means of the levy, and that act having been done by him while he had the lawful authority to perform it, places him in such a situation in relation to the property, that a right of disposition is conferred upon him. This principle, growing so naturally out of the situation in which the property is placed, in the hands of an ex-sheriff, is liable to no injurious consequences. The property is in his hands, he knows he has it, and he knows he is liable to the creditor for the amount of the execution he had levied on it, and to the debtor for the value of the property over and above the sum for which it was seized. It is his interest to sell, and discharge himself of his trust at once; and it is the interest of both debtor and creditor that he should sell, which either one or the other will not fail to cause him to do, if he delays, by quickening process.

But how different is the situation and powers of the sheriff, in almost all these particulars in relation to land. It is not capable of being wasted, therefore there is no necessity for the sheriff to take possession. He acquires no special property in the land levied on, and can maintain no action in relation to it; nor does a levy on land satisfy the execution.

Hogshead vs. Caruth, 5 Yerg. 227. Upon what principle then can he sell the land after the return of the *fi. fa.*? Suppose he goes out of office, and years, as in this case, elapse, before the sale is sought to be made; is he to keep in his memory, that he once had an execution in his hands, and that he levied it on a particular tract of land? How is he to know that the judgment has not been satisfied? that an alias execution has not been levied on other property and satisfied by his successor? Although an execution may be levied on land, if before the sale, it shall come to the knowledge of the sheriff that there is personal property on which he can levy, he is bound to abandon the land and seize the personal estate. 5 Yerg. 227. The levy is not, therefore, a satisfaction of the execution. It does not effect a disseizin of the debtor, nor vest in the sheriff any right. It has no other operation than to fix upon that particular tract, as the subject from which the sum claimed in the execution is to be raised.

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In view of these considerations we cannot give our assent to the proposition, that a levy on land, one of the slightest and most undefined acts a ministerial officer can perform, shall have the tremendous effect of divesting the freehold right of a man in possession, and of investing the sheriff with the power of selling it after the execution has spent its force. If he can sell at all after the return of the execution, he can sell at any distance of time afterwards, upon the mere request of the creditor and his own recollection that a levy was made. In this view of the subject we are supported by the supreme court of North Carolina. In the case of *Barden vs. McKinnie*, 4 Hawk. Rep. 263, it is determined that a sale by the sheriff, of real estate, after the return of a *fi. fa.*, and without a new writ, is made without authority, and passes no title. It is true, that in South Carolina, 1 Constitutional Rep. 324: 2 Bays Rep. 129: and in Kentucky, 4 Bibb's Rep. 345, a different doctrine prevails. In those cases no distinction is taken between personal and real estate, and the principles which have been so long settled in relation to the former, are made to apply in their whole extent to the latter. Because lands are by statute, made liable to be sold for the satisfaction of judgments, they hold, as the counsel for the

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defendant now argues, that there can be no distinction as to the sheriff's powers and duties. It is believed that from the several points of difference herein before noticed, a ground for making a distinction exists, both upon principle and upon the policy of the law. Nor is it probable, that either of the courts before referred to, would have disposed of the subject with so little consideration and argument, had it not been for the facts that in all the cases, the sales occurred soon after the levy, and immediately subsequent to the return day of the *fi. fa.* Had the case occurred of a sale some twenty years after the levy and return of the *fi. fa.*, by an individual no longer sheriff, upon his recollection that when in office he had levied an execution on the land in question, it would probably have received a very different consideration and determination. The mischief and absurdity of tolerating the exercise of so tremendous a power, would have been too startling to have met with a grave and deliberate sanction. And yet we must see that such a consequence might follow from the doctrine of the cases. In relation to personal property no such mischief can exist. The property remaining in the hands of the sheriff, it is the interest of all parties to force a speedy disposition of it. The creditor is not entitled to another *fi. fa.*, for the former one is satisfied by the levy. He will therefore urge a sale, and hold the sheriff liable for the amount of his execution. The debtor, to obtain any surplus the property may sell for, beyond the amount of the execution, will force the sheriff to perform his duty speedily. But in relation to land, the consequences are wholly different. The levy does not satisfy the execution, so that the plaintiff is not prevented from getting an alias *fi. fa.*, if he shall choose, and satisfying it out of other property. The debtor still retains the possession of his land, and should he know of the levy, he will have no motive to hasten the sale. Thus it remains for years before the sale is effected.

Upon the whole, we conceive it to be more consonant to principle and to sound policy, to declare that a sale of land made after the return of the *fi. fa.*, without other process having issued, to be without authority and void.

2. But it is contended, that as in this case, there was issued

a *venditioni exponas*, the sale might be regularly made, although no *scire facias* has issued against the heirs or representatives of Walker, because the levy was before the death; and if sold under the *venditioni exponas*, the sale would relate to the levy, and intermediate circumstances cannot be noticed. It is true, the sale would relate to the levy, but it does not follow that intermediate rights which have arisen are not to be noticed.

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The doctrine of relation is a fiction of law, intended to subserve the ends of justice; nor will it apply in any case, except between the same parties, and for the same ends; but it shall never work a wrong to strangers, or defeat collateral acts which are lawful. 13 Co. 41. But give the doctrine of relation all the force and effect contended for, still the difficulty in this case is not obviated. If a *venditioni exponas* must issue, to confer on the sheriff power to proceed with the sale, that process must have parties in being. If it be awarded and bear *teste* after the death of the execution debtor, it cannot be against him and command the sale of his land. He cannot be spoken of as existing, and he can have no land, that having vested in the heirs. It is not like the case of the award of an execution after the death, but which bears *teste* before the death. In that case, the award has relation to the *teste*, and the process speaks at a time when the party was in life. But in this case, it is not the award of the process that has relation to a time before the death, and speaking as of a period before that event, but it is the act the process commands to be done, which relates to another act done before the death. Take the case of a justice's execution levied on land. The constable has no authority to sell by virtue of the levy alone, but he must bring the process into court with his levy endorsed upon it, and the court direct a *venditioni exponas* to issue. When the sale is made, it relates to the levy and passes the title from that time. But although this be so, if the debtor had died after the levy, and before the order of sale, the court could not proceed to make the order and award the process, without having new parties. It would be absurd to have a judicial proceeding against a dead man, and a solemn order directing land to be sold as

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his, when the court knew, that it has vested, by his death in his heirs. The order of the court has no relation to a time before the death. It speaks after the death, and it must speak between parties then in life. Nor does the fact that the sale when made, by virtue of this order, relates to the levy before the death, affect this question. This relation would be the same if the heirs were regularly made parties, and the *renditioni exponas* were issued against them, commanding the sheriff to sell the land which had been levied on in the life-time of the ancestor, and which descended to them *cum onere*. This *renditioni exponas*, in this case, was awarded after the death of Walker, and bears *teste* after his death, it is therefore void and must be enjoined. Affirm the decree.

Decree affirmed.

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HIGH AND WIFE vs. BATTE AND BRADLEY.

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The lien of the vendor for unpaid purchase money will be enforced against a purchaser, without notice from the vendee, who only holds a bond for title.

But a purchaser by deed, from the vendee, for valuable consideration, and without notice of unpaid purchase money, will hold the land discharged from the vendor's lien, although the deed is not registered.

A purchaser for valuable consideration, without notice may rely upon that defence, either by plea, or by way of answer.

When a purchaser for valuable consideration without notice relies on this defence in his answer, all the requisites and certainty required to be set forth in a plea, must be contained in the answer.

A plea of purchase for valuable consideration without notice, must aver that the consideration money was *bona fide* and truly paid; a recital of that fact in the deed is not sufficient.

An averment in a plea or answer "that a full and fair consideration was paid" is insufficient; the defendant must state what he has paid, or in what the consideration consisted, in order that the court may judge whether the consideration is valuable.

A. Wright and Geo. S. Yerger, for complainants.

W. A. Cook, for defendants.

TURLEY, J. delivered the opinion of the court.

This bill of complainant charges, that complainant sold to one Zeno F. Harris, a tract of land; that it was conveyed to him by deed of bargain and sale, and his notes taken for the payment of the purchase money, which have never been paid, and that he is insolvent. That said Harris sold 190 acres of said tract of land to one Gardner Batte, but for what consideration complainants know not; that Harris conveyed said land by deed of bargain and sale to Batte, which deed purports to have been made in consideration of nineteen hundred dollars, but whether this amount, or any part thereof, has been paid by Batte is unknown to complainants. That the balance of said tract of land has been sold to one John Bradley, the terms of which are unknown to the complainant.

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The bill further charges that Batte and Bradley, at the time they made the purchase, had full knowledge that Harris had bought the land from the complainants, and that the purchase money was still due and unpaid, and prays that the land may be made liable therefor.

Batte answers and says, that it is true he bought the land from Harris, as charged in the bill, but denies that he knew at the time he purchased the land, or at the time he paid the purchase money, that he had not paid the debt due by him to complainants for the land, or that he knew that Harris had purchased the land from them. He states, in his answer, "that he purchased the land from Harris for a full and fair consideration and paid the same."

Bradley answers that he purchased fifty acres of the land in dispute from Harris, and took his bond for title. It is agreed by the parties that Harris executed to complainants two notes for \$625 each, which was the consideration for the purchase of the land in dispute, that \$355 96 is all that has been paid on them, and that Harris died insolvent.

There is no question whatever as to the liability of that portion of the land purchased from Harris by Bradley, although he had no notice that the purchase money was unpaid, as he has nothing but an equitable title from Harris. The law is well settled that a vendor of land has a lien upon the land to receive the purchase money, unless he has taken other collateral security therefor, and that this lien will be supported by a court of chancery against all persons but subsequent purchasers for a valuable consideration without notice. Bradley is not a subsequent purchaser, having only a bond from Harris to make him a deed of conveyance for the land at some future period, the legal title remains in Harris, and is as much subject to the complainant's lien as if the bond had never been executed.

Batte claims to hold his portion of the land discharged from the lien; because he claims to be a subsequent purchaser without notice. To this two objections are taken: 1st. That his deed is not registered in time; and 2d. That he has not in his answer shown himself with sufficient certainty to have been a

subsequent purchaser for a valuable consideration without notice.

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As to the first point, we are of opinion that the registration of a deed is not necessary to constitute a vendee a purchaser for a valuable consideration; it does not create a mere equity in the land, but an inchoate legal title, which may, by registration, be made perfect at any time, as has been determined by this court in the case of *Vance vs. M'Nairy*, 3 Yer. Rep. 171: *Shields vs. Turner*, 10 Yer. Rep. 1.

It being a legal title then, and supported by an equal equity, it must prevail against a mere equity, which is all the law has reserved to the vendor of land when the land has been conveyed.

As to the second point, the practice of the court of chancery in England requires that a defendant shall plead the fact of his being an innocent purchaser, but such has not been the practice of our courts, and we are not willing now to adopt it. But allowing that an answer may stand for a plea in such cases, yet all the certainty required in the plea must be contained in the answer. Among many other requisites not now necessary to be noticed in order to constitute a good plea, the averment that the consideration money was *bona fide* and truly paid is absolutely necessary, and that the recital in the deed cannot be received in lieu thereof, is well settled. 2 Atkins, 244: 3 Atkins, 304, 814. What shall constitute a good averment of the payment of the purchase money? Shall it be as in this case, that a full and fair consideration has been paid? We think not. What constitutes a fair and valuable consideration must be judged of by the court, not by the defendant; he must state what he has paid, and then the court can judge whether he is a purchaser for a valuable consideration. Any other mode of proceeding would be to introduce a loose and unsafe form of equity pleading and would be submitting too much to the unchecked consciences of men.

Upon this point it is admitted that the authorities are somewhat contradictory. Beames, in his treatise on equity pleading, 238, says, "pleas of this kind should aver the consideration and the actual payment of it. And in the case of *Cantrell vs. Mamington*, Finch's Rep. 219, a plea was over-

NASHVILLE, ruled because it did not set forth the amount of the purchase money, nor to whom paid. In the case of *Wagstaff vs. Read*,
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2 Ch. Cases, 156, it was held after long debate, that the plea should set forth the specific consideration paid by the vendee or it would be bad.

In note 1st to Beames' Pleas in Equity, page 238, it is said "that according to *Moore vs. Mahew*, 1 Ch. Ca. 34, S. C: 2 Freeman's Rep. 175: and *Day vs. Arundle*, Hardress' Rep. 510, the state of pleading in the reign of Charles II. was very relaxed on this point. Shirley and Faggs' case, mentioned in *Day vs. Arundle*, is to be found in 1 Ch. Cases, and does not seem to correspond with the statement of it in *Day vs. Arundle*." These are all the cases that hold a contrary doctrine from that contended for in this case; they are, in the note quoted, spoken of with disapprobation by an able commentator, and we think with justice. We prefer following the cases of *Cantrell vs. Mammington* and *Wagstaff vs. Read*, as being more consonant with that certainty which constitutes the beauty of both legal and equity pleading. The answer of the defendant Batte, then, is wholly insufficient to protect him against the lien of the complainant, as he has not brought himself within the provisions in favor of subsequent purchasers, not having shown what consideration he paid, or to whom.

The complainants are therefore entitled to the relief sought against the defendants, but inasmuch as the legal title to the fifty acres of land sold to Bradley is still in Harris, it must be subjected in the first place, and if it does not pay the purchase money due the complainants, then the land sold to Batte must be charged with the remainder. The decree of the chancellor will be affirmed.

Decree affirmed.

GUTHRIE AND WIFE vs. *The heirs of JAMES OWEN, dec.*NASHVILLE,
December, 1837.

Guthrie

v
Owen's heirs

Where dower has not been assigned to a widow, in the lands of her deceased husband, a possession of seven years by the heirs, or those who come in under them, will not, by virtue of the act of 1819, c 28, § 2, bar her right or claim thereto.

The complainant, Delilah Guthrie, was, previous to the year 1816, married to a man by the name of Beasly; Beasly died in the latter part of that year, seized and possessed of the tract of land, out of which she now claims dower. James Owen administered upon Beasly's estate, and a judgment to the amount of seventy one dollars was obtained against him, as administrator of Beasly, in the county court of Davidson county; the plea of fully administered was, however, found in his favor. A *scire facias* issued on this judgment against the complainant Delilah, as widow, and the children and heirs of Beasly, to show cause why the land descended to them should not be sold to pay said judgment; judgment was obtained upon the *scire facias*, and the tract of land was sold by virtue of it in the year 1818. James Owen purchased the land, and obtained a sheriff's deed for it in 1819, which was duly proved and registered, and possession was immediately taken by him of the land, and he has since held it claiming it as his own. The complainant afterwards married one Tandy Key; they could not agree, and parted in 1822. Key however conveyed to James Owen, as trustee, all his interest of every kind and description in both the real and personal estate, which as husband of complainant Delilah, he, by law was entitled to.

Complainant Delilah again married complainant Guthrie, in 1826, and in 1833, fourteen years after possession was taken by James Owen, this bill was filed against him. He stated in his answer, that he purchased, as he believed, the entire interest, and was not aware at the time, that the widow was, as against creditors of her husband, entitled to her dower; and he pleaded and relied upon the second section of the act of limitations of 1819, c 28, as a bar to her right.

Pending the suit James Owen died, and the cause was revived against his heirs and devisees.

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The chancellor decreed that the complainants were entitled to dower, from which decree an appeal was taken to this court.

W. A. Cook and W. Thompson, for complainants.

Geo. S. Yerger, for defendants.

REESE, J. delivered the opinion of the court.

The principal question in this case is, whether a widow to whom dower in the lands of her husband has not been assigned by the heir, or by those claiming under him, shall be barred by the possession of the heir, or of those who come in under him, if for seven years after the death of the husband, she omit to sue for her dower. It is insisted that she is so barred by the operation of the 2d section of the act of 1819, c 28. A widow in England is not barred of her dower by the statute 32 Henry VIII. c 2, because those who are barred by that statute, must count either on their own seizin, or that of an ancestor, and the widow, before assignment, has no seizin in the lands of which she is dowable, nor does she count on the seizin of any ancestor. She is not barred by the act passed by the limitation of actions, (21 James I, 1 Ch. 16:) for that act barred the right of entry to those who for twenty years after the accrual of such right, omit to enter or bring their suits. But the widow, before assignment of her dower, has no right of entry upon the premises of which she is dowable, and therefore her right of entry not existing, and that statute operating only upon such right, her title is unaffected by it.

But it is said that the statute of fines and proclamations, 1 Rich. III. c 7, or rather the statute which re-enacts that, 4 Henry VII, c 24, will bar the title to dower. This position, though in early times contradicted by Plowden, and as to its principle, questioned and criticised in modern times by Preston, is yet well established. If a fine, with proclamations, be levied, the seizin and title of the person in whose favor it is levied, become, or are taken as paramount to the title of the heirs and of the widow, and are inconsistent with her claim, and if she omit, for the five years given by the saving of the statute, to make her claim, it becomes barred by such fine

and non-claim. A fine is a conveyance of record, and although the proceeding is fictitious, yet it appears of record that the purchaser has a title, not only adverse, but paramount to that of the husband, or his heir who has suffered the recovery, and the right of dower, consequently, would not exist at all, had not the statute seen proper, because the proceeding was but a fiction, to annex a saving, and this saving extending to five years only; if there be no claim within that period, the claim is of course barred. But very different are the relations existing here in point of title between the widow and the heir, when we come to the inquiry whether the widow be barred of her dower by the 2d section of the act of 1819, c 28. Neither the title nor the possession of the heir is adverse to that of the claimant of dower, nor is it in any way inconsistent with it. The title to dower is involved with and inherent in that of the heir—his seizin and possession, although for himself, inures also to the benefit of the claimant in dower; his possession indeed, may protect, but it cannot destroy the right to dower, unless the second section of the act in question shall constrain us to give to it an effect so little in harmony with the relations which exist between the titles of the heir and the dowress. But we do not think that section creates a bar to the assertion of the widow's right to dower: 1st. Because, as we have already said, the title and possession of the heir are not inconsistent with the claim for dower. Their operation should sustain, not destroy, should give effect to, not defeat the title in dower. 2d. Because, while the law gives to the widow no right of entry upon the lands of the heir of which she is dowable, but her remedy for the assertion of her claim lies in action only; it imposes upon the heir as an active and continuing duty towards the dowress, that he should himself assign to her the dower to which she may be entitled. 3d. Because whatever different views may be entertained with regard to the first and second sections of the act of 1819, all will perhaps agree that the leading policy, the main scope, the end and aim of both are to protect those in possession of real property against claims, whether legal or equitable, which those who are out of possession hold adversely against such persons in possession; yet to embrace a

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to that of the heir, as we have shown, but it in fact makes the possession one way or the other, altogether immaterial in reference to the statutory bar. For if the second section of the statute will in behalf of the heirs, bar the widow at all, it will do so in a case where the lands being with neither party is in actual possession; nay more, the bar will exist in a case where the widow continues from the death of her husband to reside for seven years upon the premises in which she seeks to be endowed, and then brings her suit for the assignment of dower. 4th. Because the construction of the second section of the act of 1819, which would bar the widow of her dower in favor of the heir, would also create a bar in the case of a technical, direct and continuing trust. We do not think such was the object of the statute. In this case, indeed, it is not the heir, but a purchaser of his title, who insists upon the statute of limitations. But we think that the same relation exists between such purchaser and the claimant of dower, and the title remains in precisely the same attitude, as in the case of the heir himself.

There are questions in the case arising upon the deed of trust, which perhaps would, independently of the above considerations, bring the cause to the same result. But as the more general and more important question which we have discussed, will, in the view we take of it, settle the rights of the parties in this controversy, we deem it unnecessary to present those peculiar features of the case, which, if we had thought differently upon the main question, would have deserved notice. Let the decree be affirmed.

Decree affirmed.

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RICHMOND vs. RICHMOND.

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An issue to try the fact of adultery, made up on a paper distinct from the bill and answer, and submitted to the jury, is regular.

Divorce cases partake of the nature of chancery suits, and the proceedings in them are according to the course of practice in equity, except where altered by statute.

An order of the court authorising depositions to be taken, is unnecessary in divorce cases. A commission issued without such order is sufficient authority.

A witness may be impeached by proving he is not worthy of credit, or that the facts to which he deposed are not true, or by cross examination in which he may be involved in inconsistencies. If the witness is impeached in either of these modes, evidence of his general good character is admissible.

Where the plaintiff takes the deposition of a witness and declined using it, the defendant, if he chooses, may read the deposition to the jury; but in such case, the defendant makes the witness his own, and the plaintiff is at liberty to impeach the credit of the witness.

It is not competent to prove a statement made by a witness contradictory of his evidence, unless he deny upon oath that he had made such statement, but if such evidence is received without being objected to upon the trial, it is too late to object to it after verdict.

Where evidence is offered, and it is objected to upon some distinct and specific ground which cannot be sustained, it is too late after verdict to object to it upon other grounds of objection, not mentioned or urged during the trial.

The answer of a defendant to a petition for a divorce, has by the act of 1799, c 19, and 1835, c 26, the effect only of making up an issue between the parties. It operates only as a plea, and it does not, as in chancery cases, require two witnesses, or one with corroborating circumstances to outweigh it.

In ordinary equity cases, when an issue is sent to a jury for trial, although the answer is evidence, yet it is subject to the rules applicable to other witnesses, and will be looked upon by the jury with all the suspicion that attaches to an interested person.

This was a petition filed by Mrs. Richmond against her husband for a divorce from the bonds of matrimony, for adultery alleged to have been committed by him. The answer of

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the defendant denied the charge. An issue was made up, under the provisions of the act of 1799, c 19, to try the fact of adultery, which at the September term, 1837, of the Davidson circuit court, was tried by a jury, and the issue found against the defendant. During the progress of the trial, many witnesses were examined, and several legal questions were raised, all of which, together with the facts necessary to elucidate them, are stated in the opinion of the court.

Geo. S. Yerger and J. Campbell, for complainant.

T. Washington and W. Thompson, for defendant.

GREEN, J. delivered the opinion of the court.

In this case, various questions of law are insisted on as grounds for reversing the decree of the circuit court.

1. The first objection insisted on by defendant's counsel is, that the petition and answer were not read to the jury as forming the issues to be tried, but the matters submitted were drawn up on a distinct piece of paper. We perceive no error in this. The matter in issue by the pleadings, is the adultery of the defendant with the negro Polly, and with other women unknown. This identical enquiry is the one which was submitted to the jury, and to try which they were sworn. Whether it was read to them from the bill and answer, or from a distinct piece of paper, can make no difference.

2. The next objection is, that the deposition of G. G. Ridley was improperly admitted as evidence. Notice was given to take this deposition, and the day fixed was a few days after the commencement of the term, at which the order which had been previously made for taking depositions, expired. If an order were necessary to authorise the taking of depositions in such a case, there was no authority for taking this deposition. The record says it was taken after the order had expired. It was taken then without any authority derivable from said order, and must be considered as though there had been no order. But divorce cases are in the nature of chancery suits, and the proceedings in them are according to the course of the practice in chancery, except

where a difference is made by statute. The parties therefore have a right to take depositions as in chancery suits, without an order of court for that purpose. In this case the defendant was duly notified of the time and place where the deposition would be taken, and the justice of the peace who took it, certifies that it was taken in pursuance of a commission to him directed for that purpose. We are of opinion that there was no error in the court below in permitting it to be read.

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3. The next exception is to the introduction of certain witnesses to sustain the credit of Andrew Hamilton, who had been examined as a witness by complainant, on the ground that the character of said Hamilton had not been attacked by the defendant. The record shows that Hamilton was subjected to a searching cross examination by defendant's counsel, in which many questions as to the situation of the buildings, his motives for being in the place where he witnessed the facts to which he deposed, &c., all going strongly to evince that no credit was given to his statements, and tending to make that impression on the jury. A witness may be impeached by proving that he is not worthy of credit, or that the facts to which he deposes are not true, or by cross examination, in which he may be involved in inconsistencies. 3 Starkie, 1753, 7, 8.

In this case, the cross examination was of a character from which the counsel manifestly intended to argue that the witness had sworn falsely. But to put the matter beyond dispute, it is now earnestly argued, notwithstanding the witness has proved a good character, that this very cross examination convicts the witness of a falsehood, and proves that he is unworthy of belief. It seems strange that with this argument upon his lips, counsel should still maintain that the witness was not impeached. There was no error in permitting the plaintiff to prove Hamilton's good character.

4. The next objection is, that the court permitted the complainant to examine witnesses to prove that Wallace, whose deposition had been read, was unworthy of belief. The deposition of Wallace had been taken by the complainant, but was not read on her behalf, but her counsel refused to read it, whereupon the defendant's counsel read the deposition to the

NASHVILLE, jury, as evidence for him. Complainant then introduced several witnesses and offered to prove that Wallace was unworthy of credit. To proof impeaching this witness on the part of the plaintiff, the defendant objected, alleging that he was the complainant's own witness, and that she could not lawfully impeach him; but the court overruled the objection and permitted the witnesses to be examined.

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We think Wallace cannot be regarded as the complainant's witness. She was not bound to use the evidence after the deposition was taken. She did not, by introducing him before the jury, stand pledged that he was worthy of credit. We do not perceive that the case differs in principle from the case of a witness, who may be summoned and sworn in a cause but not examined by the party summoning him. If such witness be afterwards examined by the other party, he makes him his own witness, and subjects him to all the rules of evidence applicable to such relation.

5. It is insisted there was error in permitting the plaintiff to prove by T. B. Davidson, that the witness Wallace had said that the defendant had co-habited with his negro, Wallace not being asked or having denied in his testimony that he had made such statement. This statement of Davidson was illegal. It is not competent to prove what a witness may have said in conversation, although it may contradict his evidence, unless he deny upon oath that he had made the statements sought to be proved. 3 Starkie, 1753, 5. Had this evidence been objected to in the court below, it would have been error to have permitted it to go to the jury. But the record states that the plaintiff asked leave to introduce proof against the general character of B. R. Wallace, to which the defendant objected, because "he was not the plaintiff's witness although she had declined to use his testimony, and the defendant had used it." This is all the objection which was made in relation to the attack of this witness. Afterwards the record shows the plaintiff examined several witnesses as to the general character of Wallace, and then introduced and examined Davidson, as above stated. To this examination no objection was made.

In the case of *Ewell vs. The State*, 6 Yer. Rep. 364, it is decided, that if incompetent evidence be permitted to go to

the jury without objection, it is too late to except after verdict. In that case, the defendant was indicted for incest, and acts of incest not within the issue were proved; yet the court said that as no objection was made to the evidence at the time of the reception of it, it did not form ground of error in this court. In the case of *Murell vs. The State*, (decided at Jackson but not reported,) the same doctrine is re-asserted. In that case, a letter purporting to have been written by Murell was offered as evidence. It was objected to on the ground that it was irrelevant to the matter in issue, but the court decided that it was relevant, whereupon it was read without further objection. On a writ of error to this court, it was determined that as the objection was distinctly confined to the question of relevancy, and no objection having been afterwards made for want of proof that Murell had written the letter, that the absence of such proof by reason of which the letter was incompetent, did not form a ground of error in this court. These cases are decisive of the present question. Here, the objection is distinctly placed upon, and confined to the single ground of objection, to any evidence going to impeach Wallace, because he was plaintiff's own witness. As therefore there was no objection made to Davidson's evidence in the court below, its reception does not constitute a ground of error here.

6. The next objection is to the charge of the court to the jury. The answer of the defendant having been read to the jury, the court charged them that the denial in the answer of the facts charged in the bill, was equivalent to the evidence of one witness proving those facts, and that to outweigh the answer, there must be in support of such opposing witness, corroborating circumstances; but that they were to treat the answer as evidence, and looking at his situation, they were to estimate the truth of the defendant's statements in the same manner as they would the testimony of any other witness.

If there is error in this charge, and we think there is, that error is in favor of the appellant. By the act of 1799, c 19, § 2, it is provided, that where the defendant shall appear and answer, and either of the parties shall desire any matter of fact that is affirmed by the one and denied by the other, to be tried

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by a jury, the same shall be so tried. By the act of 1835, c 26, § 5, the same provision is re-enacted. By this provision, the answer of a defendant to a petition for a divorce, has the effect only of making up an issue between the parties. It operates only as a plea would do. In the sixth section of the act of 1835, it is provided, that if a defendant admit the adultery, or other facts charged in the petition, still no decree shall be pronounced until proof be heard of the facts. These provisions show that the technical rules applicable to chancery proceedings, are not to be applied to cases of this kind. But if it were an ordinary equity case, and an issue was sent out of chancery to be tried by a jury, although the answer would be evidence, yet it would be subject to all the rules applicable to other witnesses, and will be looked upon by the jury with all the suspicion that attaches to an interested person. Grisley's Eq. Ev. 157: *Searcy vs. Eaton*, MS. decided by this court. As therefore the judge in his charge to the jury only erred in giving the answer of the defendant more weight than it was entitled to have, the defendant cannot ask for a reversal of the decree on that account.

7. The remaining question to be considered is, whether the verdict of the jury ought to have been set aside as contrary to the evidence. This question must be determined upon the same principles that are applicable to trials at law. By the act of assembly, the party wishing it is entitled to have the issues tried by a jury. It is not competent therefore for the chancellor to disregard the verdict and decide the cause upon his own conclusions as to the facts.

If the party has a right to a jury trial, then all the rules established by this court, must apply in their full force. It is unnecessary therefore to go into an examination of the proof in the cause. It is enough to say that the verdict is not repugnant to the evidence, so far from it, that when the evidence of Hamilton, Mulherrin, Mrs. Eins and Alley, are taken together, and we do not consider either of them as having been successfully impeached, it is very difficult to resist the conclusion to which the jury have arrived.

Without any open rupture, it is manifest from the proof, that a coldness has for a long time existed between these par-

ties. In this state of things he established his shop in Nashville, several miles from his residence in the country. He took up his residence at his shop in town, and took the girl Polly, with whom the adultery is charged, to keep house for him. He visited his family but seldom, scarcely once a week. He was in the habit of sitting by the fire with Polly after the laborers in the shop had gone to bed. He often undressed before her and went to bed. Her bed was in a room adjoining that in which he slept. No other person slept either in his room or in hers. When these facts are considered in connexion with the fact that Hamilton saw him setting on her bed in the country and hugging her, that Mrs. Bins saw him undressed in the act of rising from the pallet on which Polly slept, and that Alley saw them near each other in the house in town, he buttoning up his pantaloons, and she brushing down her disordered and rumpled dress, it must be admitted that the jury were warranted in finding that they had committed adultery. Juries and courts must judge of facts as other men of discernment, exercising a sound and sober judgment on circumstances that are duly proved before them. That a man thus living from his wife, sleeping thus near a woman towards whom he certainly felt no disgust, and in relation to whom he has been found in so many equivocal positions, is still innocent of the charge of adultery, is barely possible. We therefore affirm the decree.

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Decree affirmed.

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BEDFORD vs. BRADY.

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Where a party sues in equity for a demand upon which, if sued for at law, an action of debt might have been brought, the act of limitations of six and not of three years will bar the complainant.

Where a note or order evidencing indebtedness, is given up to the debtor for a claim on the government, which latter claim was not allowable by law: Held, that the consideration upon which the note or order was given up had failed, and as the note or order was delivered to defendant, equity had jurisdiction to set it up and decree payment of its amount.

In December, 1817, or January, 1818, Doctor Shelby sold Wm. Brady a horse, to be used by Brady on the Seminole campaign, for which horse Brady was to pay ninety dollars before his departure, or give Shelby whatever he should be valued at when mustered into service, or in case of Brady's death, Shelby was to take a horse left by Brady at John Harding's.

Brady did not pay the money before his departure, and on his return he gave Shelby at his request, a paper of the following tenor: "I promise to deliver the holder of this paper a claim on the United States for a horse lost on the Seminole campaign, to be valued at \$150."

Shelby transferred this paper to Saml. Houston, he to Geo. A. Bedford, and he proposed to assign it to the complainant, William H. Bedford, but he preferred to have the claim or certificate itself, upon which, Geo. A. Bedford enclosed the obligation to Brady and gave to complainant an order on him for a certificate. In 1826, Brady placed in the hands of complainant a certificate for \$150, and other certificates for lost horses and other property to the amount of \$750, and as the bill alleges, agreed that he should collect them from the government and pay himself the amount of the order drawn in his favor by Geo. A. Bedford, out of the proceeds when collected. Brady also on the 30th January, 1826, gave complainant a power of attorney in his name, to collect from the legal and proper officer appointed or that may be appointed at Washington City by the United States, to pay for property lost in the military service of the United States, all his demands

Vide Burdoin vs. Shelton, ante page 41.

against the government for lost property. On the 4th of March following, the complainant filed claims for lost property, and among others, for that lost by Brady, in the office of the third auditor of the Treasury, who did not then act upon them, and they were left on file in said office by complainant, awaiting the action of the auditor. In April, 1826, Brady himself being at Washington, procured his claims to be passed upon, and on the 1st of May was paid about \$400 in discharge of such as were satisfactorily established, for which sum he executed his receipt. Among his claims for lost property was one for the horse purchased of Shelby, which was filed with the others.

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By letter dated June 20th, 1826, the third auditor informed complainant, in answer to his letter making enquiries in relation to the claims filed by him, that Brady had caused his claims to be adjusted in person, and had been paid, &c. In reply to this letter, under date of July 15th, 1826, complainant informs the auditor that before the receipt of his letter, Brady had called on him and informed him what he had done, and adds, "the claims were the *bona fide* property of the Colonel, which were left by him with me for collection, and his calling on you and making settlement, was doing what he had a right to do, and which accords with my wishes."

About the 1st. of June, 1831, Bedford filed this bill praying a decree against Brady to pay him \$200, the valuation of the horse he bought from Shelby, with interest on the same from the time it might have been received, say from the year 1818 or 1819; or if the court should think him entitled to recover no more than the amount specified in the paper given by Brady to Shelby, then he prays for a decree for that amount, with interest from July 20th, 1822, the time when he purchased it.

The defendant among other things relies upon the statute of limitations, and that the remedy, if any, was at law. The answer also denied the statement in the bill, that complainant was to have a lien on all the certificates, and to pay himself out of the proceeds in the first instance; but the answer states that the specific claim or certificate of \$150, was given to complainant in payment of the order, and that the

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was not for the lost horse but for lost equipage, and was dis-
allowed, not merely from defect of proof, but because the
utmost allowed by law for lost equipage was \$38.

W. A. Cooke, for complainant. First as, to the jurisdic-
tion of the court. We conceive the court had jurisdiction.

1. The complainant had clearly a lien on the claims and
certificates placed in his hands for the amount of his debt. If
this be so, then the jurisdiction is undoubted. Although the
complainant may have had a remedy at law, the jurisdiction
in chancery was concurrent.

2. The complainant came here for a discovery as to the
fact that these claims were put in his hands as means of pay-
ment, and that discovery was obtained, at least as to one of
those claims; this gives jurisdiction, for having it for one pur-
pose, the court will assume it for another to do complete jus-
tice.

Again; the note and certificate were delivered up and in the
hands of the defendant, so that complainant had a right to come
into this court on that ground alone.

The statute of limitations is no defence, for the complain-
ant's claim would not have been barred in a less time than six
years, and this time had not transpired before filing the bill.

R. J. Meigs, for defendant. If the paper given by Brady
to Shelby, above recited, is to be regarded as an assignment
of \$150 of his claims against the United States for lost prop-
erty, and he afterwards received the money so assigned, he
would be looked upon in law as receiving it for the use of the
holder of the paper, who could sustain an action against him
for money had and received. 1 Chit. Pl. 385, *et seq.* 1
Maule and Selwin, 714: Chit. Pl. 387. The case in Maule
and Selwin which is referred to by Chitty with approbation,
founding on it a proposition in his text, is very much to the
purpose here contended for.

This action accrued May 1st, 1826, when the money was
received, and is of course barred by the statute of limitations
in three years.

If there is a plain, unembarrassed remedy at law, this court has no jurisdiction—if it has, the bill might have been filed as soon as the money was received and withheld, and the statute of limitations applies to the bill as well as to the action. If this is a case, in which there is not concurrent jurisdiction vested by the principles of law in the law and equity courts, but exclusively in those of equity, then it deserves to be looked upon as a stale demand, the right being vested in complainant by his own showing, as early as July 20th, 1822, and his suit delayed till June 1st. 1831, being nine years and upwards. 1 Story's Eq. § 529, p. 502.

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But that complainant looked to Brady for the money as late as July 15th, 1826, and did not look to Brady's claims filed in the third auditor's office, is demonstrated by his letter of that date to the auditor, above recited, because he says in that letter, the claims are the Colonel's *bona fide* property, they were left by him with me for collection, what he did he had a right to do, and it accords with my wishes.

REESE J. delivered the opinion of the court.

In 1818, Wm. Brady bought of Doctor John Shelby, a horse with a view to enter upon the military service of the U. States, on account of which he afterwards gave to Doctor Shelby a note of this tenor, "I promise to deliver the holder of this paper a claim on the United States for a horse lost on the Seminole campaign, to be valued at \$150." This note by delivery, passed from Shelby to Houston and from Houston to Geo. A. Bedford. The last named person proposed to let the complainant have it, but he said he would prefer to have the claim or certificate itself, whereupon George A. Bedford surrendered to Brady the note, and gave to complainant an order upon Brady for a claim or certificate for the amount of \$150.

Some time in the spring of 1826, the defendant placed in the hands of complainant, five several claims or certificates for property lost in the service of the United States, two for \$200, one for \$150, one for \$125, and one for \$80, in order that he might collect them from the government, for which purpose a power of attorney was given by the defendant to com-

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plaintant, upon which the order from George A. Bedford to defendant was given up to the latter by the complainant, who alleges in his bill that he was to have for his claim a lien on all the certificates, and to pay himself the \$150, and the balance if collected to defendant.

Defendant in his answer denies this statement, but avers that the specific claim or certificate of \$150, was given in payment of the note or order. Afterwards the complainant having filed in the proper department the claims of defendant, the defendant himself obtained from the government \$400, for the certificates of \$200 each, and the balance of the claims have never been allowed. The specific claim or certificate for \$150, which in his answer defendant alleges was given in payment, was not for a lost horse, but for lost equipage, and it was disallowed according to the deposition of Peter Hagner Esq., not only from defect of proof, but because the utmost allowed by law for lost equipage would not exceed \$38. According to the answer itself then, and the proof of Hagner, complainant on the ground of failure of consideration, would be entitled to recover, unless barred by the statute of limitations, or unless this court should want jurisdiction. The suit is not barred by the act of limitations, because the action at law might have been either *indebitatus assumpsit* or debt, and the six years necessary to bar the latter had not elapsed from 1828, before the filing of this bill.

But secondly, also, a court of chancery has jurisdiction in this case upon the grounds set forth in the answer itself. The note and the order were both surrendered to defendant, and the \$150 equipage certificate, as defendant alleges, given in payment. How, under such circumstances, without the utmost difficulty and embarrassment, if at all, could complainant have maintained an action at law. The defendant had got up first the note, and then the order, and if it were true, that when delivering over to complainant four certificates to collect for him, he delivered to him a fifth, as payment for the note and order, that fact seems to have been exclusively known to defendant himself. So in any view of this case, either that presented in the bill, or that presented in the answer, a court of equity has jurisdiction to give the relief in this case sought.

Let the decree be reversed, and let the complainant recover against defendant the \$150, with interest thereon from July 1826, until this time.

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Copeland

▼
Bennet

Decree reversed.

COPELAND AND PARK vs. BENNET AND PARK.

A mortgaged a slave to B, and subsequently mortgaged the same slave to C. At the time the mortgage was made to C, B's mortgage was not registered, nor had C any notice thereof. B's mortgage was afterwards registered before C's: Held, that by the 6th section of the act of 1831, c 90, the mortgages took effect from their registration, and B's had priority.

¶ A prior mortgage, who registers his mortgagee after a subsequent mortgage is made by the mortgagor, but before the latter is registered, will, notwithstanding he had notice of the latter mortgage at the time he had his registered, be entitled to priority.

On 12th day of February, 1828, in Lauren's district, South Carolina, the defendant Andrew Park, executed to the complainants, Copeland and Park, a mortgage for girl Phillis, to secure them in the sum of \$300, for which sum they had become his securities in a note to the complainant James Park. Andrew Park remained in possession of the negro, and soon after the execution of the mortgage, he removed to Franklin county, Tennessee, bringing with him the girl Phillis. In 1832, Andrew Park borrowed \$450 from the defendant Bennet, and to secure him delivered the girl Phillis. - On the 2d day of February, 1833, he executed to Bennet a bill of sale, absolute on its face, for the negro Phillis, in consideration of \$358 50, part of the \$450 previously borrowed. The balance of the \$450 was secured by a bill of sale on other property, but which property was afterwards taken to pay another debt. In December, 1833, complainant, William Park, went to Bennet's house and demanded Phillis, but Mrs. Bennett refused to give her up. Complainants then procured Andrew Park to acknowledge the execution of their mortgage, before the clerk of the

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county court of Franklin county, on the 26th of December, 1833, and caused it to be registered in Franklin county the same day. This bill was filed the 15th day of January, 1834. The bill of sale to Bennet was proven and registered the 18th day of December, 1834.

When the bill of sale was executed by Andrew Park to Bennet, it was agreed by the latter that Andrew Park might redeem the girl Phillis by the 25th of December, 1833.

J. Campbell, for complainant contended,

1. That the proof in the cause proved beyond dispute, that the bill of sale from Andrew Park to Bennet was only a mortgage, in which event complainants would have a right to redeem from him.

2. The mortgage to complainants was executed first, and was registered first. This, by the positive provisions of the sixth section of the act of 1831, c 90, gives to it priority over the defendants. It is objected, that complainants knew when they registered their mortgage, that the defendant had purchased, and had a bill of sale, and that therefore his mortgage cannot take effect as against the defendants. To affect a purchaser's title, by notice of another equitable right, he must be a subsequent purchaser. Act of 1831, c 90.

M. Taul, for the defendants. 1st. Bennet was a purchaser for a valuable consideration, without notice of complainant's mortgage. The purchaser is the real owner of property in equity, from the moment he pays the consideration. *Cooke's Rep.* 437.

2. Complainants' mortgage, not having been registered in South Carolina, is void, as to subsequent purchasers.

3. It was a fraud on the part of the mortgagees to permit Andrew Park to remove the negro from South Carolina to Tennessee, and be in possession of her here, as the apparent owner for such a length of time after the debt became due. Vide the case of *Maney vs. Killough*, 7 Yerg. 445.

4. Although complainant's mortgage was first registered, it cannot prevail over Bennett's purchase, because before the acknowledgement and registration, complainants had notice.

What amounts to, or is evidence of notice? Vide 2 Fonb. 150, § 3. NASHVILLE,
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Complainants admit in their bill that Bennett had possession. For the true construction of the registration act of 1831, see the case of *Hays vs. McGuire*, 8 Yer. 92.

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5. Andrew Park's possession of the negro, in Tennessee, for more than three years, claiming her as his own, vested in him the absolute right of property, 4 Yer. Rep. 174: ib. 597: 5 Yer. Rep. 281.

6. James Park having no interest in the suit, was improperly made a complainant. Although the bill states that the mortgage was made to the complainants, it was in fact made to James Copeland and William Park.

7. The note for \$300 was fraudulent, so far as James Park was concerned. From his own showing, Andrew Park had only received \$246, over and above his share of the estate. It was therefore fraudulent in him to take security for a larger amount.

TURLEY, J. delivered the opinion of the court.

Upon the facts presented in this record two questions are presented. 1st. Is the title of Bennet, if he had any, a mortgage or an absolute conveyance? That it is a mortgage we cannot doubt; all the circumstances show and the parties admit that it was so originally, but say, that the equity of redemption was released before Bennett knew of complainant's title. If the equity of redemption was released, it was without consideration, and the court will not permit the claims of creditors to be defeated thereby.

2d. This court has, in the case of *Douglas vs. Morford*, 8 Yer. Rep. 373: and the case of *Payne vs. Lassiter*, not reported, decided that a vendee of a negro acquired no title thereto, against any person except the vendor, unless the conveyance be by bill of sale registered according to law. In this case, the mortgage of complainants was registered on 26th day of December, 1833, that from that time it was a good title as against all persons who had not acquired rights to the negroes, previously thereto, is admitted; but it is insisted that Bennet had. It is true he had taken a conveyance of

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till the 18th December, 1834, and by the 6th section of the act of 1831, c 90, it only took effect from the date of its registration. Complainants' title then, having been registered first, and being founded on a fair and valuable consideration, must overreach and destroy any claim of Bennet's, arising out of a subsequently registered bill of sale.

But it is said, that the complainants at the time they registered their mortgage had notice of Bennet's bill of sale, and that they are therefore bound by it. This is not the law. The complainants were not subsequent purchasers, and this principle applies to none other. If Bennet's bill of sale had been registered first, and he had had notice of the existence of the complainant's mortgage, he would have been bound thereby, as a subsequent purchaser. For the statute above referred to, provides, that any deed of conveyance, bill of sale, or other instrument, which shall be last executed, but first registered, shall have preference, unless it is proved in a court of equity that such subsequent purchaser had full notice of the previous conveyance.

The decree given in this case will therefore be reversed, and a decree in conformity with the rights of the parties entered in this court.

Decree reversed.

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PEARCE vs. GLEAVES, et. al.

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Under the statute of distributions of Tennessee, although there is a will and only a partial intestacy, still advancements made in the life time of the testator, must be brought in, upon a division of the undivided personalty.

In cases of partial intestacy, the devises or bequests in the will of either real or personal estate, are not, under the act of 1766, advancements made in the life time of the testator, therefore, they are not to be brought in and accounted for, in the distribution of the unbequeathed residue of personal property.

Testator by his codicil says, "Since I have assigned the above, (i. e. the will,) I find I had forgotten to make provision for my daughters; after the death of my wife, I wish my negroes to be sold, except negro boy Jack," &c. and three others named in the will. He then bequeaths \$200 to one of his daughters, and no more, and directs all his debts, stock of horses and cattle, &c. to be equally divided among all the children, including the daughters: Held, that the proceeds of the slaves ordered to be sold do not vest in the daughters, but are undisposed of.

The facts of the case are stated in the opinion of the court.

W. E. Anderson, W. A. Cooke and R. J. Meigs, for complainant.

F. B. Fogg and Geo. S. Yerger, for defendants.

REESE, J. delivered the opinion of the court.

The question, which at the threshold presents itself is, whether in a case of partial intestacy, those claiming a distribution of the personal estate, not bequeathed, shall be required to bring into contribution the portions advanced to them by the testator in his life time? As such contribution is directed by the statute of distribution, the entire provisions of which are distinctly and in terms predicated upon a dying intestate, it is argued, that were such intestacy does not exist as to the whole estate, the case, by the very letter of the statute required with a view to such contribution has not occurred, and that the equality which the statute seeks to attain in cases of intestacy, can have no ground upon which to operate, where the testator, by making a will, has shown a purpose

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not to submit to the rule of distribution by the law prescribed. Such have been the opinions of the English courts upon the statute of Charles the Second, of which our statute of 1766 is a copy. See Ves. 224: 2 William's on Executors, 918, 919. And such too have been the opinions of the courts in some states of our union. See 4 Dessau. 252. But solid as may be deemed the grounds upon which these decisions have been based, the question here is not regarded as open. For although the cases of *Vance vs. Huling*, 2 Yer. Rep. 134: and *Goodrich vs. Sturdevant*, 3 Yer. Rep. 95, arose upon the statute of descents, 1784, still, as the provisions of that statute, also, are predicated upon a dying without a last will and testament, the same objection would have existed to the collation of the lands settled upon his children by the testator in his life time, with those undevised lands which constituted the subject of the partition. The same remarks may be made with regard to the decisions of North Carolina upon our statute of 1766. 3 Hawk. 76: 2 Murphy, 150.

2. The next question is, whether in a case of partial intestacy, the devises and bequests in the will can, under the act of 1766, be considered as advancements made, or portions settled in the life time of the testator, so as to affect the distribution of the unbequeathed personal property? This question has been conclusively determined in the negative in England, upon the statute of Charles the Second; in North Caroling, upon our statute, and in other states of the union, upon statutes similar; and there is no authority to the contrary. The cases of *Vance vs. Huling*, 2 Yer. Rep. 135, and *Goodrich vs. Sturdevant*, 3 Yer. Rep. 95, are expressly placed upon the omission, in the Statute of descents, 1784, of the words, "in his life time," which occur in the statute of distributions of 1766, and the settlement cases in England, also referred to in the above mentioned cases, distinctly disclaim the construction by them given to the terms of the settlements in question, as being applicable, or as having at any time been adopted in reference to cases arising under the statute of distributions.

It is decided, indeed, in the cases in 1 and 2 Yer. Rep.

that lands devised may be brought into collation with lands undevised, but it cannot thence be contended successfully, that because in this case lands were devised, they shall by virtue of these decisions, be brought into contribution in the distribution of the unbequeathed personal estate, because, as we have said, these decisions were made upon the ground of the omission of the words "in his life time," in the act of 1784, which words occur in the act of 1766, under which the case before us arises, and by virtue of the terms of the latter act, both devises of land and bequests of personal property are excluded from the claim of contribution in a case of partial intestacy.

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3. A question on behalf of the daughters of the testator, has been raised upon the words in the commencement of the codicil, which are as follows, to wit: "Since I have assigned the above, I find I had forgotten to make provision for my daughters; after the death of my wife, I wish my negroes to be sold, except negro boy Jack, which I give to my son, Michael Gleaves," and then he excepts and bequeaths three other negroes. It is insisted, that after the declaration of the testator, that he had not made a provision for his daughters, the sense of the thing and the intention of the testator require that the words, "therefore," or "to that end," should be inserted, so that it might read, that having discovered that he had not made an adequate or any provision for his daughters, for that end or purpose, he wished his negroes to be sold, after the death of his wife, with the exceptions enumerated.

It is not necessary to criticise the cases which have been referred to on either side, to show that the court to effectuate an apparent intention, have, or have not over the words of the will, the suppletory power contended for. Because, in the balance of the codicil there is a specific bequest to one of the daughters of \$200, with directions that she should have no more, and all the debts due the testator and all his stock of horses, cattle, &c. are directed to be equally divided among all the children, including the daughters, except the daughter above spoken of.

If then the testator had disposed of the proceeds of the

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sale of the negroes, there is from the codicil itself, more reason to believe that with some further view to a provision for his daughters, he would have given the proceeds among all his children, with the exception perhaps of one daughter, than that he would have given such proceeds to the daughters exclusively. We are therefore of opinion that the decree of the chancellor should be affirmed.

Decree affirmed.

107 362
110 460

THOMPSON vs. WATSON AND GIBSON.

A surety or endorser may, notwithstanding the act of 1801, c 18, insist upon any matter in discharge of himself, which constituted a distinct ground of equitable relief, before the passage of that act.

Where the complainant, the accommodation endorser on a bill single, verbally notified the holder to sue the maker and prior endorsers at a time when, if suit had been brought, the money could have probably been made, but which he neglected to do until they became insolvent, it was held, (notwithstanding a judgment by default had been taken against the complainant,) that he was discharged in equity.

The mere giving time by the creditor to the principal, unless it is founded upon an agreement binding upon the creditor, will not discharge the surety.

The bill in this case, alleged several distinct and independent grounds for equitable relief, all of which were controverted, but as the opinion of the court is wholly founded upon one of the grounds set forth in the bill, the facts in relation to that, as found in the bill, answers and proof, were as follows:

On the 20th January, 1835, the defendants, Watson and Gibson, recovered a judgment by default against the complainant Thompson and George W. Richardson for \$489 60 and costs. This judgment was obtained against complainant and Richardson, as endorsers of a bill single, purporting to be executed by James L. Bryant, payable to Hayden Arnold, or order, at the office of discount and deposit of the Bank of the United States at Nashville, for \$450, dated 30th March, 1833, and due four months after date. The bill sin-

gle was endorsed by Hayden Arnold as first endorser, George W. Richardson as second, and complainant as third endorser, and was endorsed for the accommodation of Richardson, the second endorser.

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The note when endorsed by Thompson was without date. It was executed and endorsed about a year before March, 1833, the time it bears date, but was delivered at that time to defendants for valuable consideration.

At the time the note fell due, Bryant, Arnold and Richardson (particularly the two first) were merchants in good standing and credit. In the month of August, 1833, Thompson notified Watson and Gibson to proceed to collect their money on the note, otherwise he would be no longer responsible. In the month of November afterwards he wrote to Stephen Adams to give a similar notice, which notice Mr. Adams verbally gave to defendants. At the time Thompson notified them to sue, both in August and November, Bryant, Arnold and Richardson were all in good standing and credit; and if at that time suit had been brought or steps had been taken to secure the debt, it might have been done. It was not done until the spring or summer following, when all the parties but the complainant had become insolvent. No reason was alleged in the bill, as to this point, why the defenceⁿ insisted on was not made at law: The answer insisted on this as a defence to the bill. The chancellor was of opinion the complainant was entitled to relief, and decreed a perpetual injunction against the judgment at law. From the decree the defendants appealed to this court.

J. Campbell, for complainant. 1. The complainant had a right to call on Watson and Gibson to sue, or to proceed to collect their debt from those who were liable on the note before him. Act of 1801, c 18, § 1, 2, 3. If the creditor fails to sue when called on, the surety may avail himself of the defence either at law or in equity. *Hancock vs. Bryant and Hunt*, 2 Yer. Rep. 476: *Pain vs. Packard*, 13 J. R. 174: *King vs. Baldwin*, 17 J. R. 384.

2. Whatever will discharge the sureties will discharge the

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endorsers. Theobald on Principal and Surety, 180, marginal, 107, at top.

3. The omission of the surety to defend at law, where he has given notice to the creditor to sue the principal debtor, and he has neglected or refused to do so, to the injury of the surety, will not prejudice the sureties right in equity. *Pain vs. Packard*, 13 John. Rep. 174: *King vs. Baldwin*, 17 John. Rep. 384: *Hancock vs. Bryant*, 2 Yerger's Rep. 476.

4. The date of the note was left blank, and was afterwards filled up, without a re-delivery; this renders it void.

Geo. S. Yerger, for defendants. 1. Does notice from a surety to the creditor to proceed against the principal debtor, and his failure to do so, discharge the surety? I maintain that it does not. The true rule is laid down by Chancellor Kent. *King vs. Baldwin*, 2 John. Ch. Rep. 554.

More delay to sue the principal, although the creditor has been notified to proceed, is not sufficient to exonerate the surety from liability; delay to proceed against the principal, in order to have this effect, must be delay for value, i. e. a contract for delay. *M'Leone vs. Powell*, 12 Wheaton's Reports: *Johnston vs. Searcy*, 4 Yerger's Rep. 182, 491: 1 M'Cord's Ch. Rep. 454: 9 Wheaton's Rep. 720.

The remedy for the surety, if the creditor will not sue, is to file a bill making the creditor and principal debtor parties, and thereby compelling the latter to pay it. 1 Story's Eq. § 639: *Wright vs. Simpson*, 6 Vesey, 734: *Nesbit vs. Smith*, 2 Bro. Ch. Rep. 579: *Hays vs. Ward*, 4 John. Ch. Rep. 123: *King vs. Baldwin*, 2 John. Ch. Rep.

The case of *Hancock vs. Bryant and Hunt*, 2 Yerger's Reports, does not settle the law upon the point. In that case Catron, Ch. J. dissented; it is founded upon *King vs. Baldwin*, 17 John. Rep. This latter case ought not to be regarded as a controlling authority, it was decided by a bare majority of one senator against the opinion of chancellor Kent and a majority of the judges of the supreme court of New York, and is based upon fallacious and unsound reasons. (Here the counsel examined and commented upon the reasons given for the decision.) It is contrary to the rule laid down by judge

Story and the English chancellors, and has been generally dis-
 approved of by every American court when the subject has
 been examined. Vide 5 Pickering's Rep. 307: 4 Pickering's
 Rep. 382: 2 Pickering's Rep. 614: 4 Vermont Rep. 131:
 cited Chitty on Bills, (last edition,) appendix 816: 1 Dev.
 Rep. 484: 1 Watts' Rep. 146—7.

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2. But, admitting the cases of *King vs. Baldwin* and *Hancock vs. Bryant and Hunt* to be law, they do not apply to this case; this is not the case of a surety. An accommodation endorser, although for some purposes he is considered in the nature of a surety, yet, he has not that character upon a question of this kind. The endorsement is a distinct and independent contract. 6 Cranch's Reports. It is not a guaranty that the principal shall pay, but it is a distinct undertaking that if the maker does not pay the note at maturity, the endorser will; when he pays it, the note is not extinguished, but it becomes his property and he may sue upon it. The distinction between a mere surety, and an accommodation endorser, is well settled. The rule laid down in *King vs. Baldwin* does not, even in the courts of New York, apply to the case of an accommodation endorser. 16 John. Reports, 152: *Beardsly vs. Warren*, 6 Wendal, 613: 3 Wendal's Rep. 216: *Proul vs. Lennox*, 3 Wheaton's Rep. 580.

3. The act of 1801, c 18, § 1, 2, 3, does not affect this case. To make a notice available under that act, it must be in writing; in this case it was only verbal. This court has solemnly decided upon two occasions that where the provisions of the statute require a notice or contract to be in writing, the courts cannot, without repealing the legislative enactment, dispense with it. *Patton vs. M'Clure*, Martin and Yerger's Rep; *Newnan vs. Carroll*, 3 Yerger's Rep. 26.

4. The date of the bill single was left in blank, and was filled up at the time of its delivery by Richardson. This it is said renders it void.

Bills single, by our act of 1762, c 9, are placed upon a footing with bills of exchange and promissory notes, and must be governed by the same rules. Blanks left for names, dates, &c. in promissory notes and bills of exchange, &c. do not avoid them. Chitty on Bills, (last edition) 170, 313, and

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note to that case.

5. The endorsement in this case was not under seal, and if the relief sought by this bill is available at all, the defence could have been made at law, and no legal reason is shown why it was not made. 7 John. Ch. Rep. 332: 2 Page's Rep. 499: 2 John. Ch. Rep. 555: 1 Hill's Equity Rep. 99: 3 Starkie's Ev. 1389. And, although equity may have a concurrent jurisdiction, yet if the case originated in a court of law, the defence must be made there unless some reasonable cause is shown why it was not. *Green vs. Thompson*, 3 Yerger's Rep: 8 Con. Ch. Rep. 65: 10 Peter's Rep. 498.

REESE, J. delivered the opinion of the court.

Watson and Gibson obtained at law a judgment by default against complainant and one George W. Richardson, as endorser of a bill single, purporting to be executed by James L. Bryant, as maker, and made payable to Hayden Arnold, at the branch bank of the United States at Nashville, dated in March, 1833, and due four months after date. It is endorsed by Hayden Arnold, as first endorser, by George W. Richardson, as second endorser, and by complainant as third endorser. It is satisfactorily proved in this case, that at the request and for the accommodation of Geo. W. Richardson, and without consideration, Bryant, Arnold and complainant, about a year before the date of the bill single, became parties thereto, for the purpose of its being negotiated in the branch bank of the United States, to meet and satisfy some existing liability of Richardson, the bill single being then left undated. At the time it bears date, it was passed to Watson and Gibson by Richardson in payment of a pre-existing debt. In August, 1833, Thompson, the complainant, verbally requested Watson and Gibson to commence suit upon the note, and in the month of November afterwards he wrote to Stephen Adams, requesting him to notify Watson and Gibson that he did not wish to continue liable as endorser, and that they should forthwith institute suit upon the bill single; Adams did this, by showing to them the letter of complainant. They replied that Richardson had been asking time till Christmas, and that

they believed him to be an honest man, and had confidence that he would pay. Suit was not brought till the spring or summer of 1834, at which time all the parties to the note, but the complainant, had become insolvent. But the proof makes it probable that in August or November, 1833, the debt could have been collected from Bryant, Arnold and Richardson. The answer admits the verbal demand to bring suit in August, 1833, and the notice to the same effect given through Adams in November. Questions relating to the insertion of a date in a sealed instrument—to the use of the bill at one time, for a purpose different from that for which it was created at an earlier time—to the effect of the accommodation character of the paper, if known to the defendants when they received it in payment of a pre-existing debt, and especially, as to the effect of any or of all these matters upon the jurisdiction of a court of chancery after a trial at law, have been raised and elaborately discussed by the counsel. But we have deemed it proper to limit our consideration of the case to the enquiry, whether the complainant be entitled to relief in this court, upon the ground that in August or November, 1833, the defendants were requested and urged to bring suit upon the bill at a time when, in all probability, the money could have been made of those first liable, but which they omitted and refused to do until all but the complainant, became insolvent. This enquiry has been settled in the affirmative by a case fully in point decided by the supreme court of this State, the case of *Hancock vs. Bryant and Hunt*, 2 Yerger's Rep. 476. This case has to sustain it, the authority of *King vs. Baldwin*, 17 John. Rep. 384; which latter case was founded upon that of *Pain vs. Packard* in the same State. But the authority of the case of *King vs. Baldwin* has been questioned in the argument, and indeed denied on the ground that a majority of senators against the weight, and numbers, and talent of the bench decided the case; and upon the further ground that it has been questioned and impugned in Pennsylvania, Vermont, &c. And we are also called upon to overrule the case of *Hancock vs. Bryant*, which, it is said, has not met with the approbation of the profession. It is not necessary that we should state whether, if the question

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were *res integra*, it would receive at our hands a similar determination. We have had occasion more than once to express our sense of the importance of adhering with some uniformity to decisions when once made, deeming fluctuation of judicial opinion an evil of such magnitude as not to find its equipoise of good, in any fancied or real approximation to greater correctness. In New York, the case of *King vs. Baldwin*, though decided perhaps against the opinion of a majority of the profession on the bench and at the bar, remains, after the lapse of eighteen years, undisturbed, and exacts the acquiescence, if not the approbation of the profession in that State. Yet the principle maintained in the cases of *Pain vs. Packard* and *King vs. Baldwin*, unlike the case of *Hancock vs. Bryant*, has no statutory ground upon which to stand. It would be a matter of more difficulty, therefore, to overthrow the authority of our own case than the New York one. Before our statute of 1801, c 18, a surety might have filed, as he still may, his bill against his principal and the creditor, alleging the apprehended insolvency, or removal of the former, and have compelled payment of the debt. By that act, when a security or the assignor of a bill, bond or note may entertain similar apprehensions, he can give notice in writing to the creditor to put the instrument in suit against the principal or drawer, and if for thirty days this be omitted by the creditor, he shall thereby forfeit the right he would otherwise have had to demand and receive the amount due from such assignor or security.

Section 4th provides that when sued at law, the assignor or security may give the act in evidence, if by two witnesses he prove in open court a copy of the notice. But not having it in his power in a court of law to make this full proof and formal defence, the security may in chancery, according to the case of *Hancock vs. Bryant*, insist upon the equity which he had before the statute and by the statute, and show that he requested the creditor to bring suit, which he refused and omitted to do, and that such refusal and omission had operated upon him an injury. This, it is said, shall affect the conscience of the creditor. Such is the principle of the case of *Hancock vs. Bryant*, and this case, which we do not

feel at liberty to overrule, is decisive of the one before the court. In yielding to the authority of *Hancock vs. Bryant*, we do not mean to question the principle determined in the case of *Johnson vs. Searcy*, 4 Yerger's Reports, 182, and in still more recent cases, to wit: that the mere giving of time by the creditor to the principal, and not upon an agreement which would bind the former, shall not exonerate the security. To that principle we give our full assent. The case before the court, and the case of *Hancock vs. Bryant* rest upon another ground, upon the express request of the surety to sue, upon the refusal or omission of the creditor to comply with such request to the injury of the surety or endorser. In this case the request to sue is not only admitted by the defendants in their answer, but is likewise proved. It is satisfactorily proved also, that the refusal or omission of the defendants to comply with this request, produced injury to the complainant, because, in the meantime, those who were liable before him and to him, became insolvent. The decree will be affirmed.

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Trainer
v
Skein

Decree affirmed.

TRAINER vs. SKEIN.

Decrees in chancery for money, do not bear twelve and a half per cent. interest per annum, from the time of their rendition in the court below until affirmance in the supreme court.

R. J. Meigs, for complainant.

Geo. S. Yerger, for defendant.

GREEN, J. delivered the opinion of the court.

A decree has been pronounced at the present term, in this case, affirming a decree of the chancery court made in favor of the complainant against the defendant for \$259 20. The counsel for the complainant moved the court for a further decree of twelve and a half per cent. per annum on the said sum, since the rendition of the decree in the court below.

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We do not think the act of 1823, c 54, which is relied on to sustain this motion, applies to suits in chancery. In the second section it speaks of actions of debt on bonds for the payment of money, bills single, bills of exchange, promissory notes, &c.; and throughout the second and third sections the words judgment, writ of error, and appeals in the nature of writs of error, are used, all applying peculiarly, and some of them exclusively to proceedings in courts of law, and we think show the intention of the act to be for the regulation of proceedings at law only.

It may also be observed that the policy of the act does not apply to suits in equity. The twelve and a half per cent. is in the nature of a penalty upon the party, who appeals merely for delay. This is rarely the case in chancery causes. There is almost always some dispute, and it is not the policy of the law to discourage appeals in such cases. Although no case in which this court has given a construction to the act under consideration is reported; yet the view here taken has governed the practice of the court ever since the passage of the act.

The court therefore refuse to allow the twelve and a half per cent. per annum asked for, but direct that interest be calculated on the decree below at the rate of six per cent. per annum, and be allowed the complainant in addition to the principal sum hereinbefore decreed.

Decree affirmed.

GADSBY vs. DONELSON, *et. al.*NASHVILLE,
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v
Donelson

A judgment against an executor *de son tort*, of A, is not sufficient to give equity jurisdiction to proceed against equitable personal estate, belonging to A.

The facts of the case are to be found in the opinion of the court.

Alexander, for complainant.

E. H. Ewing and J. Campbell, for defendant.

GREEN, J. delivered the opinion of the court.

In this case the bill charges, that Lemuel Donelson died in 1832, intestate, leaving a large personal estate, to which Elizabeth Donelson, his widow, and their two children were entitled.

After the death of Lemuel, Elizabeth employed complainant to do some carpenter's work for her, which was executed to the value of \$68. After said work was performed, said Elizabeth died intestate. The defendant, William Donelson, in October, 1832, administered on the estate of said Lemuel, and took it into his possession, and still retains it. Said William paid all the debts of said Elizabeth, except complainant's, which he refused to pay. Complainant sued him as executor of said Elizabeth, and by proving that he had thus intermeddled with her estate, making himself her executor *de son tort*, he recovered a judgment for \$102 32, and \$55 75 costs of suit.

The plea of fully administered was found for said William, and complainant has no remedy but in a court of equity, and he prays that the distributive share of said Elizabeth of her husband's estate, which said William has in his hands, be subjected to the payment and satisfaction of his judgment.

To this bill the defendants demurred, the demurrer was sustained by the chancellor, and complainant appealed to this court.

The decree of the chancellor was clearly right in this case. William Donelson does not represent the rights of

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to be proceeded against, as executor; but he was liable only to the extent of the goods in his hands. He could not maintain a suit for the recovery of debts due to Elizabeth, as her executor. If he could, his wrongful act would confer on him benefits, create for him rights, which he could not have acquired but by the wrong. It follows, that if the executor *de son tort*, could not maintain a suit for Elizabeth's distributive share, a creditor, through such executor *de son tort*, cannot subject it to his debt. The fact that William Donelson is the rightful administrator of Lemuel, and also the executor *de son tort* of Elizabeth, does not alter the case from what it would be if some other person had been Lemuel's administrator. Had that been the case, it is apparent that William, the executor *de son tort*, could not have sued such administrator, and recovered Elizabeth's distributive share; and if he could not, the creditors of Elizabeth cannot surely do it through him. As this ground is decisive of the case, it is unnecessary to enter upon the discussion of other points raised at the bar. Let the decree be affirmed.

Decree affirmed.

NASHVILLE,
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LANE vs. DICKERSON.

Lane
v
Dickerson

Although a bill of sale, absolute on its face, may be converted by parol evidence into a mortgage, yet the parol proof must be clear, decisive, and without doubt.

Mere inadequacy of consideration, coupled with general remarks by the defendant at different times, that he intended to "let complainant redeem the property," that "no other but complainant should redeem," that "he might have the property by paying thirty per cent," &c. is not sufficient evidence to convert an absolute bill of sale into a mortgage.

Where the proof of a parol defeasance is contradictory and uncertain, it will be held insufficient to change an absolute bill of sale into a mortgage.

For the facts of this case, see the opinion of the court.

A. Wright and J. W. Combs, for complainant.

W. A. Cooke and W. Thompson, for defendant.

TURLEY, J. delivered the opinion of the court.

The only question for the consideration of the court in this case is, whether the bills of sale, absolute on their face, executed by complainant to defendant, one for a wagon and horses, and the other for a negro man, were by the contract of the parties at the time of their execution, intended to be mortgages.

The bill expressly charges that they were, and the answer as expressly denies the fact. A bill of sale, though absolute on its face, may be converted into a mortgage by proof of a parol agreement to redeem. 3 Yer. Rep. 513: But in order to do this, the proof of the agreement must be clear, decisive, and without doubt, or otherwise no man would be safe in his title, either to real or personal property. Is the proof in this case of such a character? We think not. It shows that the property had been previously mortgaged to Shields, that Dickinson paid to him the amount due, being \$523 52, part in a cash note, and part in his own note, and that the property was at the time worth \$785. Upon which fact an argument is based, that complainant would not have contracted with defendant for an absolute sale, at so diminished

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a price. This circumstance of itself cannot act as a defeasance to the bills of sale. If the inadequacy of consideration were so gross, as to shock the mind, it might be relied on as evidence of a fraud and imposition, upon an application to rescind the contract, but it is not so here; the difference not so great, and all that the court can presume from it, in the absence of other proof, would be, that the complainant was anxious to have the property released from the mortgaged debt, which was due, and that he placed the fund in the hands of another, under the hope, that he might be by him permitted to have a longer time to pay the money.

The case of *Conway's executor vs. Alexander*, 7 Cranch, 241, does not conflict with this view of the case. There the court say, "that a conditional sale made, at a price bearing no proportion to the value of the property, would bring suspicion on the whole transaction, and in the opinion of some of the judges, would furnish irresistible proof that a sale could not have been intended," manifestly on the ground of gross inadequacy of consideration, which they say would convert a conditional sale into a mortgage. This is the point principally pressed by the counsel for the complainant. It is true, there were loose and unsatisfactory remarks made by the defendant at different times after the execution of the bills of sale, as to an intention of permitting complainants to redeem the property, such as his remark to Morgan Fitzpatrick, "that no other man than complainant himself should redeem them." To Lane himself, to "bring on the money." To Fry, "that he (defendant) might as well have a good bargain as Fitzpatrick, and that Lane might have the property by paying him thirty per cent." All of which amounts to nothing, and from which nothing can be inferred.

But it is said, that Richard Wilks proves that he heard Dickinson say, "that he had redeemed of Shields and he "did not believe complainant would be able to redeem it again, and if he did not, he had as well have a good bargain as any one else." That George Dyer proves, "that he heard the defendant say, he had paid Shields \$522 for the purpose of redeeming the property, in consequence of a contract between himself and complainant, and that his under

standing was, that the defendant was to give up the property when complainant paid him the money, and that Wm. K. Gordon was present when this conversation took place, and that Stephen Chinault proves that he heard defendant say, "all he wanted was his money at the time appointed, and complainant should have his property." In answer, it has been well replied, that as to Wilk's testimony, it is loose and uncertain, that it does not show that there was an agreement for redemption, much less one existing at the date of the bill of sale, and is indirectly contradicted by the disposition of Shields, who says, that he drew the writings between the parties in their presence, and at their request, that they were signed immediately after they were drawn; that the defendant once or twice previous to the writing of the bill, informed him that he would have no other than absolute bills of sale for the property; that the bills of sale were written as they are, by the consent of the parties, that he did not transfer his lien, but destroyed it, and that his impressions are, that the deeds were read to complainant before they were signed. That as to George Dyer's testimony, he does not state how his understanding was formed as to the intention of giving up the property when the money was paid, whether from facts or otherwise, and as to the substance of the conversation, Dyer himself, as is proved by John B. Hill, in July, 1834, said that he never heard the defendant say that the property was redeemable by the complainant, and furthermore, that Gordon, who was stated to have been present at the time of the conversation, states that he did not hear it, and that Stephen Chinault is discredited. The court is of opinion, therefore, that upon this testimony no defeasance can be set up. But this opinion is greatly strengthened by the proof adduced by the defendant. Goff deposes, that shortly after the transaction, he inquired of the complainant whether there was any agreement between him and the defendant that the property was to be redeemed, and that he stated there was not, but that he thought that the defendant would permit him to redeem, and Davidson proves that he was requested by the complainant to inform the defendant, that the money was ready for him and was answered that he had no right to re-

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NASHVILLE, deem, that he did not buy the property to give back, and
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that he could not get it back without paying him more than he had given for it. We therefore affirm the decree of the court below, dismissing the bill.

Decree affirmed.

YARBROUGH vs. NEWELL.

Although a bill of sale of slaves be absolute on its face, yet as between the parties, it may be shown by parol proof or by a parol defeasance to be a mortgage.

In all cases where an absolute deed is executed to secure the payment of a debt or money loaned, the contract will be valid and effectual in equity as a mortgage.

The statute of limitations will not bar a bill filed to redeem mortgaged property.

In cases of direct trust, the mere denial by the trustee of the right of the *cestui que trust* will not be sufficient to protect the possession of the trustee, he must in order to make his possession adverse, show that the *cestui que trust* knew that he was holding adversely for himself and not as trustee.

Where a party constitutes another his agent merely for the purpose of tendering redemption money due on a mortgage, which he does, and the mortgagee denies the mortgagor's right to redeem, this is not such notice to the mortgagor of a denial of his right to redeem as will constitute an adverse holding by the mortgagee.

To change the relations which exist between mortgagor and mortgagee, and to constitute the possession of the latter adverse to the former, there must be actual personal knowledge by the mortgagee that the mortgagor is holding adversely to his right—constructive notice will not be sufficient.

The bill charges that on the 24th of May, 1831, the complainant being indebted to sundry persons and in need of money, and for fear his property would be sacrificed at execution sale, and owning a negro girl, Caroline, that he knew would be the first seized upon and sold by the officers to satisfy the claims in their hands for collection, he applied to the defendant for a loan or to get him to satisfy his debts, and of-

ferred him said negro girl as security for his advances, and a small amount due Newell, not in all exceeding \$250, which said Newell agreed to; that the transaction was a loan on the one side and a conveyance on the other, with condition that he should have liberty to redeem in six months.

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That he took from said Newell a paper writing which Newell told him was to bind him to pay \$250; that he cannot read or write, and that the paper writing does not contain the true contract between the parties; that he applied to Newell to redeem and tendered him the money and he refused to return the negro, alleging the money was not paid within the six months; that said Newell has had possession of said negro ever since.

The defendant in his answer expressly denies that the transaction was a mortgage or conditional sale, but says it was absolute and unconditional, and that the two instruments of writing contains the whole contract, that he refused to advance money and take a mortgage on the negro, but stated the sale was absolute, and that if complainant repurchased her, he must contract for her as any other person.

The facts proved, in relation to the question whether this was intended as a mortgage or not, and also in relation to the statute of limitations, are stated in the opinion of the court.

The chancellor's decree was in favor of complainant.

G. Boyd, for complainant. Courts of equity in deciding what is, or what is not a mortgage, look to the real intention of the parties at the time of making the contract, and they will not permit a conveyance designed to be a security for money lent or advanced, to stand as an absolute sale of property, whatever its form may be, and parol proof may be introduced to show the real intention and true meaning of the contract. 4 Kent, 142: 3 Yer. Rep. 513, 525: 4 John. Ch. Rep. 167: 5 Binney: 699 Yer. 172: 2 Yer. 215. The depositions in the cause prove beyond doubt, that the conveyance from Yarbrough to Newell, though absolute upon its face, was in truth understood between them as a pledge or security for the money to be advanced in payment of Yarbrough's debts. When it is once ascertained that the instrument is to be considered

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and treated as a mortgage, then all the consequences appertaining in equity to a mortgage, are strictly observed, and the right of redemption is regarded as an inseparable incident. 4 Kent. 143: Fonb. Eq. 530-1.

2. The mortgagor's right of redemption is not barred by the statute of limitations. 3 Yer. 513, 525. These two cases decided by our supreme court, are directly in point, and if not overruled must settle the question in this case. See also 9 Wheat. 489: 1 Wash. 14: 1 Powell on Mort. 360, a 4 Cranch, 415, decided upon the Georgia statute of limitations which may be seen in the same book at page 367: 1 Hawks. 17.

Wherever there are concurrent remedies in law and equity, and the party sleeps upon his rights till the bar attaches at law, equity will follow the law and refuse relief; but in cases of mortgage and of express technical trusts, created by contract, which are the exclusive creatures of a court of chancery, and where the courts of law afford no redress, the statutes of limitations do not apply. 3 Hay. 152, 58: 1 Yer. 296, 3 Yer. 201: 7 John. Ch. Rep. 125: 20 John. Rep. *Murray vs. Coster*.

W. A. Cook, for defendant, Contended, 1. That the bill of sale is absolute on its face. To allow parol evidence to contradict it and to prove that it was intended as a mortgage, is dangerous in the extreme; the evidence therefore should be strong, irresistible and conclusive, particularly where the answer denies positively that a mortgage was intended. Vide *Lane vs. Dickerson*, decided by this court.* He insisted that the evidence in this case was not of that character. (The counsel here examined and commented on the testimony.)

2. The complainant's right to redeem is barred by the act of limitations. The defendant has held the slave adversely to the complainant's right more than three years, and from the situation of the parties, the complainant must have known that the defendant disclaimed any right upon his part to redeem. This right was explicitly denied to complainant's agent. The

*Reported ante page.

possession from such denial was adverse. *Demarest vs. Wyn-*
coope, 3 John. Ch. Rep. 129. *Laman vs. Jones*, 3 Harris
 and M'Henry, 328: *Beckford vs. Wade*, 17 Ves. 99: *Lytton*
vs. Lytton, 4 Bro. Ch. Rep. 458: *Hodel vs. Healy*, 3 Ves.
 and Beames, 536: *Murray vs. Terrel*, 4 Yer. 104: *Hughes*
vs. Edwards, 9 Weat. Rep. 489: *Elmendorf vs. Tayler*, 10
 Wheat. Rep. 152: *Cholmondely vs. Clinton*, 2 Jac. and
 Walker, 1.

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3. Courts of equity act in obedience to the statute of limitations. The same length of time will bar a right in equity that would bar it if the remedy were a legal one. 1 John. Ch. Rep. 129: 2 Ves. Rep. 472: 3 Bro. Ch. Rep. 639: 6 Ves. Rep. 199: 10 Ves. Rep. 453: 2 Mereval's Rep. 358: 3 John. Ch. Rep. 137: 2 Sch. and Lefroy, 607, 630: 1 Swanston, 312: 17 Ves. 87: Angel on Lim. 132.

4. Three years possession by our act of limitations, vests the right and does not simply bar the remedy. Our statute in this respect is stronger than the statute of fines, and cuts off all equities. *Kegler vs. Miles*, Mar. and Yer. Rep. 426: *Porter vs. Badget*, 4 Yer. Rep. 174: *Hardeson vs. Hays*, 4 Yer. Rep. 504: *Davis vs. Mitchel*, 5 Yer. Rep. 281, *Laurence vs. Beidleman*, 3 Yer. Rep. 496.

GREEN, J. delivered the opinion of the court.

This bill is brought to redeem a negro girl Caroline, which complainant alleges he had mortgaged to the defendant to secure to him the payment of certain sums paid by defendant to the creditors of complainant. The answer denies that the negro was mortgaged, and insists that defendant purchased the girl for a full price, and took from complainant an absolute bill of sale. The proof shows that defendant had advanced complainant some money, and that he took an absolute bill of sale for the girl, agreeing to advance other monies in payment of complainants debts, to the amount of \$250. It was also agreed that the complainant should be permitted to redeem the girl in six months from the date of the bill of sale. We have no doubt from the facts in this case, but that the negro was taken by the defendant as a security for the money he had advanced, and if so taken, it is well settled that the contract

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shall be valid and effectual as a mortgage as between the parties, although the mortgagee took a deed absolute on its face, and registered it as a deed. Nor does the fact that the defeasance rests in parol, alter the question; for if such was the real understanding of the parties, it may be established by parol evidence. 4 Kent's Com. 142: *Overton vs. Bigelow*, 3 Yer. Rep. 513: *Hammond vs. Hopkins*, 3 Yer. Rep. 535: 4 John. Ch. Rep. 567: *Hickman vs. Cantrell*, 9 Yer. Rep. 172.

2. But as more than three years elapsed from the time limited in the contract for the redemption to be made, before this bill was filed, it is insisted that the statute of limitations is a bar to the redemption sought. In the case of *Overton vs. Bigelow*, 3 Yer. Rep. 513, this court expressly decided that the statute of limitations cannot be pleaded to a bill to redeem a mortgage.

The right to redeem, says the court, can only be enforced in a court of equity, and in such cases the statute of limitations is no bar. 20 John. Rep. 525: 4 Kent's Com. 180. The cases in the English books are by no means uniform in regard to the application of the statute of limitations to a bill to redeem a mortgage. Twenty years is the time limited by courts of equity, within which a mortgage may be redeemed; and as that is the time fixed by the statute of limitations, it has some times been said that the right of redemption is barred by the statute of limitations. But it is manifest that those judges who have used this language, have been negligent as to their mode of expression, and do not state with precision the ground upon which the bar is placed. Their statute of limitations of twenty years "is assumed as a fit and proper ground for taking the length of possession therein mentioned as the presumption of right. 4 Kent. 187. This, Chancellor Kent says, is the general doctrine in England and in this country, in respect to remedies in equity."

In those States of the Union where the time fixed by the statute of limitations is twenty years, the courts of equity have taken the same time "as the presumption of right" in a mortgage. But we know of no case, either in this State or any of the other States, where the statute of limitations is for a

shorter period, that the courts of equity have reduced the time within which a mortgage may be redeemed to that period.

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The mortgagee is a trustee for the mortgagor. Angel on Lim. 123. His right is consistent with that of the mortgagor, nor does he hold adversely to him. The mere fact that the mortgagee holds possession of the property mortgaged, will not bar the equity of redemption, unless it has been held so long as to afford a "presumption of right." So great a favorite with the courts of equity has the equity of redemption grown, and so highly is it cherished and protected, that it has become a maxim, "once a mortgage and always a mortgage." We therefore re-affirm the doctrine laid down in the case of *Overton vs. Bigelow*, that equity does not permit the statute of limitations to be pleaded to the relief which it affords to the right of redemption, but that it discountenances stale demands.

3. But it is said, that the defendant denied the right of the complainant to redeem, and refused to receive the money tendered by his agent, and that from the time of such denial and refusal, he held adversely to the complainant, and that the statute will run from the time such adverse holding commenced. If this were the case of a direct trust, the mere denial of the right of the *cestui que trust*, would not be sufficient to protect the trustee by the statute of limitations; he must show that the *cestui que trust* knew that he was holding adversely, and for himself, and not as trustee. It does not appear from the evidence in this case, that Yarbrough had any knowledge that the defendant denied his right to redeem. Niblett, the only witness who speaks upon that subject says, that he tendered \$250, to the defendant as the agent of the complainant, and that Newell stated, the complainant had a right to redeem but the time had expired." Phipps says that Newell said, "he had a firm bill of sale of the negro, and that no one but Yarbrough could redeem, or that he would not receive it from any body else." Take this testimony together, and it would seem that though the defendant would not receive the money from Niblett, yet it did not follow that he would not have received it from Yarbrough. But without putting any stress upon this view of the subject, it is enough to say, that so

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far as the proof informs us, it does not appear that Yarbrough was informed of Newell's denial of his right of redemption. It is true, Niblett was his agent to tender the money, and it is also true, that in most cases notice to the agent is notice to the principal. But here the agent had no authority to sue for the negro. When he tendered the money he had discharged his agency. In such a case, this court, in the case of *Duke vs. Harper*, 6 Yer. Rep. 280, decide that notice to the agent is not sufficient. Judge Catron in delivering the opinion of the court says, "it is going far enough to say, Duke was holden out so soon as he had knowledge Harper claimed adversely, and that this knowledge was equal to an actual turning out or holding out, on an attempt to enter for the forfeiture; but to hold that the refusal to pay rent to Tribble who had no authority to enter upon the land, or sue for it in Duke's name, is evidence of an actual ouster of Duke, is not warranted by any authority." In that case, Harper was Duke's tenant, and Tribble was Duke's agent to receive the rent. Harper had disclaimed Duke's title, and refused to pay rent to Tribble more than seven years before the suit was brought. The principle is that to change the relations of the parties in such cases, there must be actual personal knowledge that the possessor is holding adversely and for himself. Constructive notice will not be sufficient.

The result of the foregoing discussion is, that the mere fact of the possession of the mortgaged property by the mortgagee, will not authorise him to plead the statute of limitations, but we do not determine that an open adverse holding by the mortgagee, which is known to the mortgagor, will not operate a bar to the redemption within the time fixed by the statute of limitations.

That question not arising in this case, it is left open for future consideration.

Let the decree be affirmed.

Decree affirmed.

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December, 1837.THURMAN *et al.* vs. SHELTON *et al.*Thurman
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Shelton

Distributees cannot recover their distributive portions without an administration on the estate of their intestate.

A person in possession of an intestate's personal property can hold it against any person, but a creditor or an administrator; to the first he is liable as executor *de son tort*; to the second, because he is the representative of the deceased, upon whom the law casts his personal estate.

A bill filed by an administrator, in conjunction with the heirs and distributees of the intestate, as co-complainants, to recover personal property in possession of defendant and to divide and distribute it, is multifarious.

Where a bill is multifarious, advantage can only be taken of it by demurrer.

Before the statute of limitations can operate as a bar to the recovery of property, there must not only have been an adverse holding for the time prescribed by the statute, but there must have been some person in existence capable of suing, and not within any of the savings of the statute.

Where a bill of sale of slaves was made by a person *non compos mentis*, and who continued such until the time of his death: Held, that up to the time of his death the statute of limitations did not run against him, because persons *non compos* are excepted out of the operation of the statute—and that after his death, it did not begin to run until administration was granted on his estate.

J. Campbell, for complainants.

R. J. Meigs, for defendants.

TURLEY, J. delivered the opinion of the court.

Ralph Shelton, the father and grandfather of the complainants and defendants, died in the summer of the year 1818. Previous to his death, viz: on the 2d day of August, 1815, he deeded to his son John a tract of land of three hundred acres, on which he then lived in Knox county, for "full satisfaction" received from him. This deed was proved at the April session of the county court of Knox county, 1816, and registered on the 11th day of December, 1816. On the 9th day of January, 1815, he also made a bill of sale to his said son, John, for four negroes, Sylvia, Charlotte, Jim and Patience, for the consideration of \$700, which was proved at the April session, 1815, of the county court of Knox, and regis-

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tered August 18th, 1815. On the 20th October, 1817, John Shelton made a bill of sale of the same negroes to his brother, Richard Shelton, for the consideration of \$1200, which was proved at the February session, 1818, of Grainger county court, and registered on the 4th of March, 1818. Richard took possession of the negroes immediately after the date of the bill of sale, and retained them until his death, and they yet remain in the hands of his widow and heirs. After the death of Ralph Shelton, in 1818, John Shelton continued to reside on the three hundred acre tract of land, conveyed to him as before stated, and also took possession of a tract of sixty acres adjoining, claiming it under a parol gift of his father.

No administration was ever granted on the estate of Ralph Shelton, deceased, until it was obtained by James Bledsoe, one of the complainants, with the view of avoiding difficulty in filing this bill, but notwithstanding this, Richard Shelton, after the death of his father, sold his father's perishable property, amounting in value to \$223, and made use of the money, and also took into his possession negroes, Ralph, Easter and Dave, the property of his deceased father, and kept them till his death, and they now remain in the possession of his wife and children.

This bill of complaint was filed on the 20th day of August, 1836, against John Shelton and the widow and heirs of Richard Shelton, deceased, alleging that the deed and bill of sale executed by Ralph Shelton, deceased, to his son John, were void, because the said Ralph was *non compos mentis* at the time they were executed, and praying that the property may be divided according to law between the complainants and defendants, the heirs at law and distributees of Ralph Shelton, and for an account of the rents, issues and profits thereof.

The defendants seek to protect themselves against the relief asked, upon this ground. 1st. That distributees have not a right to file a bill for their distributive portions in their character as such, against any person but the personal representatives of the deceased; and that though in this case one of the complainants is the administrator of Ralph Shelton, yet he has filed his bill, not in the character of administrator, but as

a distributee, and that if this be not so, the bill is multifarious, because parties have been joined who claim in different rights, and therefore the suit cannot be maintained.

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2d. They deny that Ralph Shelton, at the date of the deed and bill of sale was insane.

3d. They rely upon the statute of limitations, claiming to have held adverse possession of the land for seven years, and of the negroes for three years, before the commencement of this suit.

The first ground of defence embraces three separate propositions. 1st. Can distributees recover their distributive portions without an administration on the estate of their intestate? We are clearly of opinion that they cannot. Personal property was, by the common law, considered of so little value, that no provision was made for its descent to the heirs at law of the owner. Indeed, up to the 22d and 23d Charles II, the date of the passage of the statute of distributions, an administrator was entitled exclusively to enjoy the residue of the intestate's effects, after the payment of the debts and funeral expences. 2d Williams on executors, 906. This being the case whoever can get possession of personal property upon the owner's dying intestate, can hold it against any person save a creditor, or an administrator; to the first he is liable as an executor *de son tort*, to the second, because he is the representative of the deceased, upon whom the law casts his rights to the personal estate to be held by him for the payment of debts, and since the passage of the statute of distribution, for distribution among the next of kin of the intestate. A distributee stands in neither of these relations, and therefore cannot sue for the personal property of the intestate, nor demand a distribution of it from any person save the administrator.

2d. Can this be considered as a bill filed by the administrators of Ralph Shelton, deceased, in conjunction with distributees and other heirs to set aside the void conveyance to the land and negroes, to regain possession of his personal property, and to have a division and distribution thereof? We think it may; for though the administrator is one of the heirs and legatees of Ralph Shelton, and the bill is framed primari-

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ly for a division and distribution of the estate, yet it expressly charges that James Bledsoe has administered on the estate, the better to receive it, and to avoid any cavil that might be made by reason of there being no administrator. Then, the administrator is before the court as a complainant so described and declared to be, and that, for the purpose of enabling it to give him relief as such, if administration be necessary—and shall we say that the suit is not in his name, because he has not filed his bill as specifically in that character as he would have done had he been suing at law? We think not. Chancery deals less in forms than law, and all that it asks upon questions of this character, is, that the pleadings shall show that the parties entitled to the relief sought are before the court.

3d. Is the bill multifarious? We are inclined to think that it is, inasmuch as an administrator, heirs at law and distributees, have been joined as complainants; but we do not consider it of any importance in the present case, whether it be or not, as it is a defect in equity pleading which can only be taken advantage of by demurrer, as was determined upon solemn argument by this court in the case of William Holt against Rice and others, not reported. There is then nothing in the first ground of defence.

The second presents a question of fact as to the sanity or insanity of Ralph Shelton, at the date of the deed and bill of sale to his son John. There is a great mass of testimony taken on this point; it would be a useless labor to enter into an examination of it in a written opinion, and would swell it beyond bounds; let it suffice, that the insanity at the time is expressly charged in the bill and denied argumentatively and evasively in the answer, and that the whole weight of the proof, with the exception of two or three witnesses, the near relations of John Shelton by marriage, supports the fact of the insanity at and before the execution of the deed and bill of sale, to our minds satisfactorily and conclusively, and the more especially so when it is admitted that no consideration whatever passed from John Shelton to his father for either the land or negroes. Then the deed and bill of sale were

ab initio void, and passed no title from Ralph Shelton to John either in the land or negroes.

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The third and last inquiry is, has the statute of limitation perfected the title of the defendants either to the land or negroes? Possession of the negroes and land was taken by John Shelton and Richard Shelton, under the deed and bill of sale, during the lifetime of Ralph Shelton, and has been continued from that period up to the time of filing the bill. But the proof establishes the fact that Ralph Shelton was not only insane at the time of the execution of the deed and bill of sale, but so continued until his death. The statute of limitations did not commence running in his lifetime, he being within one of the savings of the statute. At his death his real estate descended to his heirs at law, and from that time the statute commenced running, as to them, upon the possession of John Shelton of the three hundred acre tract conveyed to him by his father in his lifetime, but not as to the sixty-one acres which he claimed by parol gift. Ralph Shelton died in 1818, and the bill was filed in 1836, of consequence more than seven years have elapsed since the right of action accrued to the heirs of Ralph Shelton, for the tract of land of three hundred acres held adversely by John Shelton, and the same is barred by the operation of the statute of limitations. When Ralph Shelton died, the law cast the right to his personal property on no one, till letters of administration were granted on his estate, and of consequence there was no person who could sue for a wrongful conversion of it until that was done. As Ralph Shelton was deranged from the date of the bill of sale to his death, the statute of limitations as to his personal estate could not begin to run in favor of an adverse holder under the bill of sale, but from the date of the administration, because it could not run against him, he being within the savings of the statute, and when he died, there was no person against whom the property could be held adversely, as no one had any right thereto until he acquired it by becoming administrator of the estate. It is a well settled principle of law, that before the statute of limitations can operate as a bar to the recovery of property, there must not only have been an adverse holding for the time prescribed by the statute, but there

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must have been some person in existence capable of suing for the recovery, and not within the savings of the statute. Letters of administration were obtained on the estate of Ralph Shelton, by James Bledsoe, one of the complainants, within three years before the filing of this bill, and the statute of limitations is no bar to a recovery by him of the personal estate of his intestate in the hands of the defendants. Upon the whole of this case, the court think that the complainants are entitled to a division of the tract of land containing sixty acres, and an account of the rents and profits thereof from John Shelton. James Bledsoe, the administrator, is entitled to recover possession of all the negroes and their increase, which belonged to the estate of Ralph Shelton, deceased, at the time of his death, as well those specified in the bill of sale to his son John, as others in the hands of the defendants: but inasmuch as Richard Shelton is dead, and his administrator is not before the court, he is not entitled to have an account of the perishable property belonging to Ralph Shelton, which was sold by him, nor for hire of the negroes from the time he took them into possession till his death; and that inasmuch as the administrator has, by filing this bill with other distributees assented to a distribution of the estate by the court, the parties are entitled to have it without further unnecessary delay. A decree will be drawn in accordance with their views.

Decree accordingly.

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LYTLE vs. ETHERLY.

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To redeem property sold at execution sale, under the provisions of the act of 1824, c 20, the party must deposite the amount required by law in "money," i. e. gold and silver, with the clerk of the county court of the county wherein the property was sold.

A check for money, drawn by two parties in a banking house upon their bank, indorsed upon the back thereof, by their cashier, "good," and deposited by the complainant with the clerk of the county court to redeem from the defendant land he purchased at execution sale, is not a deposite of "money" within the meaning of the act of 1824, c20.

If the amount of money deposited with a clerk to redeem land, be not sufficient, the party is not entitled to redeem.

On the 21st May, 1833, the defendant purchased at execution sale, in Davidson county, two small tracts of land as the property of Isaac Earthman. The amount bid for the land by him was one hundred and forty-four dollars. The sheriff afterwards executed to him a deed for said land. The defendant at the time of his purchase was the surety of said Earthman, in an appeal taken from a judgment rendered against said Earthman in the county court, in favor of D. Cantrell. The judgment was affirmed in the circuit court. Upon this judgment the defendant paid the sum of five hundred dollars, and obtained judgment against Earthman for said amount on the 5th day of April, 1834.

The complainant recovered a judgment against Earthman in the county court on the 5th day of November, 1833, and with a view to redeem said land from the defendant, he deposited on the 3d March, 1834, for said purpose, under the provisions of the act of 1824, c 20, a check for \$154 93, (being the amount bid by defendant, and ten per cent. thereon,) drawn by Joseph and Robert Woods, two of the partners in the banking house of Yeatman, Woods & Co. upon their bank, on the back of which check was endorsed by their cashier, the words "good." The clerk received this check as so much money, and gave a receipt to complainant as for so much money.

The defendant, who resided in Montgomery county, after

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said, having heard that complainant had deposited money with the clerk to redeem the land purchased by him, called upon the clerk and ascertaining that a check merely was deposited, he thereupon refused to receive the check, and filed his objection to the tender or deposit in writing with the clerk, and refused to permit the complainant to redeem, upon the ground that the deposit of the check was not a deposit of "money," within the meaning of the act of 1824. In November, 1834, gold and silver to the amount of the check was left in its place, with the clerk, but the defendant objected to this, that it could only be considered a tender from the time the gold and silver was deposited, i. e. in November, 1834, so that counting ten per cent. upon the original bid, up to that time, there was not enough. He also objected, that there was no offer in November, 1834, when the gold and silver was deposited, to credit Isaac Earthman with ten per cent. as required by the act. Whereupon the complainant filed the bill. The cause was heard at the October term of the chancery court, 1836, at Franklin, and the bill dismissed, from which an appeal was prosecuted by the complainant to this court.

E. H. Ewing and W. E. Anderson, for complainants.

W. Thompson and Geo. S. Yerger, for defendant, contended, 1st. That the deposit of a check on a bank, although agreed to be paid in gold and silver coin, was not a deposit of money. A check is not "money," nor equivalent to money. Chitty on Bills, 322, 287.

2d. That the act of 1824, c 20, only authorised a redemption of land sold at execution sale, when "money," i. e. gold and silver coin was deposited with the clerk of the county court of the county wherein the land was sold. That the clerk was a mere depositary to receive and hold the money, that if the statute required money to be deposited with him, he could not depart from the requirements of the statute. That the authority delegated to him by the statute was special and limited, and must be strictly pursued. 1 Cowen's Rep.

499: Cowper's Rep. 26: *Fairtitle vs. Gilbert*, 2 Term. NASHVILLE, December, 1837.
 Rep. 171: 2 P. Wms. 13, 19: *Lowry vs. McGee*, 7 Yer.
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3d. The assumption or agreement of the clerk to receive the check in lieu of the "money" required by the act, is not a compliance with the act, and is not binding on the party, who, by law, is interested to dispute it. 1 Cowen's Rep. 498: 6 John. Rep. 51. That the clerk in making such agreement exceeded his powers, and that such agreement would not be obligatory upon the sureties in his official bond. *Leigh vs. Taylor*, 7 Bar. & Creswell, 441.

4. That although the amount of money called for in the check was procured and deposited in November, 1834, it could only operate as a tender from that time; that counting ten per cent. from the time of the sheriff's sale, upon the amount bid, up to that time, the amount deposited was not enough, besides no offer was then made to credit Earthman, the debtor, with ten per cent. or more upon the amount bid, as required by the statute; that these were conditions precedent to complainant's right to redeem, and must be proved by him. 4 Yer. Rep. 10: 1 Cowen's Rep. 498.

TURLEY, J., delivered the opinion of the court.

The complainant and defendant are both creditors of Isaac Earthman, and the property in dispute is the only means he has for the payment of his debts, and which is not sufficient to satisfy the demand of either claimant. The defendant, in addition to his rights as a creditor, claims the property by virtue of a purchase at execution sale, which purchase was however made before he had acquired his right as such.

The complainant insists, that before the right of defendant, as creditor, attached to the property, he had, under the provision of the act of 1824, c 20, redeemed the same by a payment to the clerk of the county court of Davidson, (the place where the judgment was rendered under which he claims) of the money bid by him for the property at execution sale, and ten per cent. thereon, he at the time being a non-resident of Davidson county. This is denied by the defendant.

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The proof shows, that before the defendant obtained the judgment under which he claims the right to hold the property, the complainant had, upon a judgment rendered previously thereto, in his behalf, paid to the clerk of the county court of Davidson, a check of J. & R. Woods, drawn upon the banking house of Yeatman, Wood's & Co. for an amount, more than sufficient to redeem and pay the amount bid by the defendant at the execution sale under which he claimed the property, before the date of his judgment, which check was received by the clerk as money; that the clerk was a man who had always money at his disposal, and could at any time have commanded greatly more than the amount of the check if it had been demanded of him, that he did not cash the check before the defendant was a creditor as well as purchaser, at which time the amount thereof was not sufficient to authorise a redemption of the property, under our statutory provisions.

The dispute in this case involves an abstract question of right between the parties; a loss to one is a gain to the other, and neither has any superior equity over the other. The consequence is that strict law must govern.

The defendant is in the better situation, as he holds the property by an execution sale, the consequence of which is, that his right must prevail, unless the complainant can show that he has complied with the provisions of the law, under which he claims to have redeemed. That law says, that "if any person or persons shall absent him or her, or themselves from his or their usual place of residence, or shall reside out of the county where the sale is made, it shall be lawful for a person wishing to redeem, to pay the redemption money to the clerk of the county court, who shall hold the same for the benefit of the person entitled thereto."

The question then is, whether the payment of the check of J. & R. Woods is a payment of money under the provisions of the law. It is argued that it is, because the clerk agreed to receive it as such; that all that was necessary to make it such, was a presentation at the bank and having the amount passed to his credit, and that if the clerk had always at bank an amount sufficient to pay the demand of the defen-

dant, that he might take the check and hold himself responsible to the defendant for the amount thereof. To this reasoning we cannot assent. The clerk is a ministerial officer, whose duties and responsibilities are prescribed by law, and for the faithful performance of which, security is taken, the consequence is, that he cannot, so far as his securities are concerned, make them more extensive than they are made by law, because they are only responsible for their performance according to the law. Therefore, a clerk who is wealthy and has money at command, can legally do no more than can one who is poor and dependant on his office for support. That a check for money is not money until it has been paid is too self evident to admit of argument, and the question is of necessity resolved into this proposition, whether a clerk can, by choosing to consider it as money, make it so? He can as well make any other chose in action money as this, and if he can make choses in action money, there is no reason why he should not any personal property, such as a negro, a horse, &c. That this cannot be done by an officer of the court, whose duties are prescribed by law, when money is required to be received, has been determined in every case where the question has been presented as the court believes. Upon this point see 1 Cowen's Rep. 499: 6 John. 51.

If a clerk has money in bank, and is willing to appropriate it to the redemption of property for the benefit of another, and take from him something else in consideration thereof, before he can do so, the amount must be severed from his own by some act which will make it the property of the person redeemed, such as having it passed to his credit. It will not do to permit him to take property from a person wishing to redeem, upon a determination existing in his own mind, that he will consider a portion of his money as having been paid to him for that pupose, for inasmuch as he is not warranted by law in receiving any thing but money, his securities are not responsible for him until that has been paid to him, and upon an attempt to charge them, the investigation as to whether, when he received a horse, he did not in his own mind determine that he would hold a hundred dollars of his

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money, as if it had been paid to him in lieu of the horse, would present a strange spectacle in a court of justice.

Being of the opinion then, as we are, that the complainant had no right to redeem but upon the payment of the amount of money required; that the clerk had no right to receive any thing else; that a check upon a bank is not money till it has been paid, which in the present case was not done, until a period after the defendant's right as a creditor attached to the property, when the amount was not sufficient to authorise a redemption, we think the complainant has no right to the relief sought, and dismiss the bill.

Decree affirmed.

PARKER'S *et al* vs. GILLIAM, *et al*.

A party who colludes with an executor to obtain the assets, or who obtains possession of the assets by joining the executor in the perpetration of a fraud upon the estate, or who receives the assets knowing that the executor in disposing of them, commits a *devastavit*, is liable to the distributees, and the assets may be followed in his hands.

About 1810 or 1812, David Dickinson sold to Daniel Parker, the ancestor of complainants, a negro woman named Cresy. Parker died at New Orleans in the army in 1814 or 1815, leaving \$130 of the price of the negro unpaid, for which sum Dickinson held his note or notes. The defendant, Patsy, his widow, administered on his estate at October session of the Rutherford county court, 1815. In 1818, she intermarried with the defendant, Cato Freeman. On the 13th of July, 1822, she settled her administration account, when a balance of \$68 48, was found due the estate.

Dickinson still held the notes executed by Parker, and, as complainants allege, they were barred by the statute of 1789. This being their situation, the defendant, Gilliam, applied to him to know if he would let him have the notes. Dickinson refused, unless it was the wish of defendant Patsy, stating to Gilliam, that he would neither himself distress her, nor put it in the power of others to do it. Gilliam told him that Mrs. Freeman wish-

ed him, Gilliam, to have the notes. On enquiring of her of the affair, she manifested a good deal of solicitude that Gilliam should get the notes, though Dickinson told her that he would wait her own time for the money, and advised her to keep the negro and her children for her family. He accordingly let Gilliam have the notes. This was after July and before October, 1822, in which latter month, she and defendant Cato, confessed judgment to Gilliam as assignees of Dickinson, on the notes for \$195 ~~84~~, debt and interest.

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About this time, the defendant, Freeman, had become indebted to Gilliam on his individual account, in about the sum of \$250. Gilliam caused a *fi. fa.* to be issued against defendants, Cato and Patsy, as administrators of Parker, tested the third Monday of October, 1822, had it levied on Cresy and her children, Joshua and Rachael, all of whom were sold by the sheriff to satisfy the judgment obtained by Gilliam on Parkers notes to Dickinson, and purchased by Gilliam for \$600. Gilliam paid the \$600, by the judgment, and by retaining \$250 due from Freeman to him on his individual account. Whether he paid the sheriff the balance of the \$600, is unknown, but he admits that he advanced Freeman \$150, which is about the sum that would remain after deducting the judgment and Freeman's private debt.

Gilliam admits in his answer that he knew the negroes belonged to the estate of Parker.

The chancellor believing that the solicitude displayed by Mrs. Freeman that Gilliam should get Dickinson's demand against her former husband's estate, was occasioned by a wish to enable her present husband, Freeman, to pay Gilliam by means of a sale of the negroes, his individual debt; that it was a breach of trust in her and Freeman to confess judgment on those notes when they were barred by the act of 1789; that Gilliam participated in this breach of trust, and in fact procured it to be committed, in order to secure his private demand against Freeman, decreed for the complainants, the children and heirs of Parker.

R. J. Meigs, for complainant. The question in this case is, whether the plaintiffs, who are distributees, can follow the

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assets into the hands of third persons to whom the administrator has transferred them? This is the same question substantially which is discussed with great ability in *Hill vs. Simpson*, 7 Ves. 152. It is unnecessary to refer to more cases, for this is directly to the point, and of the judgment of the Master of the Rolls therein, Lord Eldon, in *Lowther vs. Lowther*, 13 Ves. 95, says, "a more accurate and truly learned one never was pronounced." But if more is necessary, I refer to 1 Story's Eq. where the doctrine is lucidly stated, § 422, 423, 424, 579, 580, 581: *M'Loir vs. Drummond*, 14 Ves. 261-2, where the application of assets to pay an individual debt of the executor is considered, and 17 Ves. 154, 158, 169, 170, 171.

These authorities prove the defendant who received the assets in discharge of an individual debt, due from the executor, is clearly liable.

C. Ready, for defendants. Do these transactions upon their face furnish evidence that a *devastavit* was committed by the administrators? and if they do, do they also furnish evidence that Gilliam was connected with that *devastavit* under such circumstances as in legal contemplation makes him a party to it? If both of these questions are decided in the affirmative, then a decree ought to pass against Gilliam, but not otherwise.

1. Does the statute of 1789, c 23, unconditionally bar all claims not sued for within two or three years, as the case may be, from the qualification of the executor or administrator? It does not. The proviso leaves a discretion in the breast of the executor or administrator. He may stipulate for indulgence, and if it be for five years, the creditor's claim is not barred during that time.

Although it is true that the judgment in favor of Gilliam against Parker's administrator, was not rendered nor suit brought until more than two years after administration granted, it may have been delayed on account of the special request of the administrator. Let it be admitted that it is the duty of executors and administrators to plead the statute of 1789, in all cases where special indulgence has not been given upon

the special request, &c.; yet, on the other hand, it must be admitted it is not his duty to plead it when the indulgence has been extended upon special request. There is a presumption of law to which it may be necessary here to advert. It is, that officers and all persons charged with fiduciary trusts have done their duty, until the contrary is proved. A judgment is then rendered against an administrator, in a suit brought after the lapse of two years from the grant of administration. He did not plead the statute. The presumption is that he did his duty; and that he did not plead the statute because he had been indulged upon his special request, and this presumption must stand until the party charging him with a want of fidelity, overturns it by proof.

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The decisions of the court of Massachusetts in regard to the limitation of actions, furnishes no data for the construction of the statute of 1789. The Massachusetts' statute contains no proviso like ours, and leaves no discretion to the executor or administrator.

But if it even be held that the administrator committed a *devastavit* in confessing this judgment, is Gilliam a party to, and affected by that *devastavit*?

He was not to blame for endeavoring to collect his debt. He had the right to sue, and the administrator might plead the statute of two years or not. *Brown and others vs. Anderson's adm'r.* 13 Mass. Rep. 201. If he failed to plead it, that could not make Gilliam a party to the *devastavit*, if it be one in the administrator. The failure of the administrator to plead payment, when he might have successfully done so, would with equal reason make the plaintiff who recovered the judgment, guilty of a *devastavit*.

2. Does the fact that a part of the price given for the negroes, was applied to the payment of Gilliam's private debts against Freeman, make Gilliam liable to account for the negroes? See *Nugent vs. Gifford and others*, 1 Atk. 463, where it was held that an executor having assigned over a mortgaged term of his testator to A, as a satisfaction of a debt due to A from the executor, it was held a good alienation, and that A should have the benefit of it against the daughters of the testator, who were creditors under a marriage settlement.

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See also *Mead vs. Lord Orrery and others*, 3 Atk. 235, in which the decision in *Nugent vs. Gifford* is recognised as correct. *Whale vs. Boothe*, 4 Term Rep. 625, note, Mansfield's opinion: *Sutherland and others vs. Brush, Crosby, and Palmer*, 7 John. Ch. Rep. 17.

GREEN, J. delivered the opinion of the court.

In this case, the bill charges, that Freeman and wife, administrators of complainants intestate, committed a *devastavit* of their intestate's estate, by confessing a judgment barred by the statute of limitations, in favor of the defendant, Gilliam, and when the assets of the estate were sold by virtue of Gilliam's execution, a part of the proceeds of the sale was misapplied, by paying Gilliam a private debt due him from Freeman, and that defendant, Gilliam, colluded with said administrators, in the commission of said fraud on the complainants. The answer admits the confession of judgment, the sale of the negroes, and their purchase by Gilliam; that he knew they were assets of the estate, and that part of their price was applied to Freeman's individual debt, but denies all fraud or collusion with the administrators to misapply the assets.

We think it is very clear that Freeman and wife intended, by the course they adopted in this business, to commit a fraud. If that were not their object, why had they so much solicitude that Mr. Dickinson should trade the note he held on Parker's estate to Gilliam. The reason given by Mrs. Freeman, as stated in Gilliam's answer, is manifestly a mere pretence. Gilliam's answer states that Mrs. Freeman desired him to get the note that it might be paid and the interest stopped. Now if the administrators were determined to pay the note, to stop the interest, in spite of Mr. Dickinson's repeatedly expressed willingness to indulge them as long as they might desire, why could they not pay Mr. Dickinson as easily as they could Gilliam. If they had no means of paying Gilliam but by the sale of the negroes, why might they not have sold the negroes to pay Mr. Dickinson? It will not be pretended that a forced sale under execution for cash, was likely to be more beneficial to the estate, than a sale made by themselves on a liberal credit.

The truth is, this reason for refusing to accept the indulgence Mr. Dickinson offered, and for desiring that Gilliam should get the note, is so manifestly absurd and false, that it cannot for a moment be insisted on, and yet, it is the only reason the parties offer. As therefore there is no reason consistent with honesty, that has been given or that can be given, why this arrangement was desired, we must conclude that they were actuated by improper considerations.

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By Gilliam's getting the note, the estate of Parker would be injured, but these administrators would be enabled to pay a private debt, get some money into their hands to embezzle, and Gilliam would get his private debt on Freeman paid, and a family of negroes into his hands without paying out any money scarcely.

Gilliam's account of the circumstances attending the transaction with Mr. Dickinson, is false. He would have us believe that the sale of a horse to Dickinson, was the primary matter of interest with him, and that as Dickinson would not pay money but offered notes for horses, the note on Parker's estate was incidentally spoken of, and so the trade was brought about. Now, if this were true, why would he be so solicitous to get the note on Parker's estate. Mr. Dickinson had other notes which he was willing to give, and he was unwilling to give Parker's note, declaring he never would distress the estate, or put it in the power of another to do it. But Gilliam insisted on getting the Parker note, and to induce Dickinson to give it up, told him the administrators wished it. Does not this show that he had some peculiar reason for wishing to get Parker's note, and that he had beforehand arranged with the administrators about it.

When we look at these circumstances, we cannot resist the conviction that Freeman and wife deliberately intended to commit a fraud in the disposition of this property, and that Gilliam actively co-operated in the iniquity. Various other circumstances might be mentioned going to confirm this view of the case, such as his pretence that he would make no arrangement with Freeman about bidding for the negroes, and yet buying them, and paying no money, but retaining it a long time in his hands, until by the increase of his private claims on

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Freeman, he could pay it that way, thereby furnishing as much suspicion of his conduct as could have been afforded by the act he was so solicitous to avoid.

The view we take of the facts of this case, entitles the complainants to a decree. The principle laid down in all the authorities is, that a party who colludes with an executor to obtain the assets, or who obtains the assets by joining the executor in the perpetration of a fraud upon the estate, or who receives the assets, knowing that the intention of the executor in disposing of them, was to commit a *devastavit* or fraud upon creditors or distributees, is liable, and the assets may be followed in his hands. 1 Atk. 463: 7 John. Ch. Rep. 17; 1 Story's Eq. § 422, 519, 580.

Decree for complainants.

THOMAS *et al.* vs. SCRUGGS *et al.*

When trustees and executors in a will, or either of them, are directed to sell land and reinvest the proceeds in other lands, and they receive and divide the trust fund between them, in part execute the trust, but violate it in other respects by omitting to carry into effect the positive injunctions of the testator, they are all equally responsible for the acts of each other.

As to the liability of trustees in general for the acts of each other, vide *Deaderick and others vs. Wharton and others*, ante page 263.

The bill is filed by complainants as legatees of Jesse Thomas, against Phineas Thomas and Finch Scruggs, the executors, and alleges that the testator died in Virginia in 1805; that the executors were directed to sell real estate in Virginia, and with the proceeds and £400, purchase real estate in Tennessee, which was given to the widow during her life, and at her death, to be divided between certain named children; that the executors sold the real estate in Virginia, and in part laid out the proceeds in land in Tennessee; that the executors sold and suffered to be sold by execution thereof, the negroes given to the widow, to pay the debts of the estate, when there was sufficient money to pay the debts; that a large

amount of personal property came to the hands of the executors, for which they never accounted; that Anthony Thomas died after the death of the testator, intestate, and without issue, in the lifetime of the widow, without having reduced to possession his portion of the estate; that the widow died in 1834.

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The bill was taken *pro confesso* as to Thomas. The answer of Scruggs admits the death of the testator, and states that himself, the widow, and Phineas Thomas, were nominated executors; that at the death of the testator he resided in Tennessee, and on his arrival in Virginia, Thomas and the widow had qualified as executors, and had sold all the real estate and personal property, and had taken the notes payable to themselves; that after his arrival he also qualified, and some years after went again to Virginia and received about \$500 from the attorney in whose hands the widow and Thomas had placed the notes for collection; and that he collected about \$400 from another source; that after the removal of the family to Tennessee he acted as executor, and with the other executors purchased land for which he alone paid \$1000; that he has paid other debts which consumed all the assets that came to his hands; that the sales of the negroes were necessary for payment of debts.

The money received by Thomas was misapplied by him; and this bill was filed to make Scruggs, his co-executor, liable therefor. The facts upon which his liability depends are stated in the opinion of the court.

R. Alexander, for complainants, insisted; 1st. That the defendants are both jointly liable for the amount for which the testator's plantation was sold, after deducting therefrom the purchase money of the two plantations bought in Tennessee, with interest from the time they collected the money, or the increased value of the land, and this for the following reasons:

1. The defendants acted as partners in complete concert in collecting that money. The answer of Scruggs states that he acted as co-executor with Phineas and Mary Thomas, from the time of his qualification in the fall of 1805 till 1834; that he supplied Phineas with money to go to Virginia on busi-

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ness of the estate, and that he went four times to Virginia on business of the estate, and collected part of this money from Wilson, the attorney in whose hands the notes were placed for collection, and for these services he claims compensation. The deposition of Phineas Thomas proves that Scruggs acted in concert with him as co-executor in selling the property and collecting the money; that they both collected this purchase money for the land, and that Scruggs went different times to Virginia to collect it, and did collect more of it than he did. So that we see they kept no separate accounts; each one had full power to collect it, and they assisted one another in doing so, and now they do not know or do not show what part each one did collect. Jeremy's Eq. Jurisdiction, 159, 160-1-2: 2 Wms. Ex. 1119: Willis on Trustees, 194-5: *Deaderick vs. Cantrell*, decided at this term.

2. The will created a trust, and by taking probate of the will, and acting under it, the defendants accepted the trust, and by failing to perform the trusts of the will according to its true intent and meaning, each trustee became personally liable for the whole loss or *devastavit* occasioned by such breach of trust. 2 Williams Ex. 1104, 1105: *Deaderick vs. Cantrell*, decided this term: *Mucklow vs. Fuller*, Jacob's Rep. 198, in 4 Eng. Ch. Rep. Con. 93: *Bone vs. Cook*, 13 Price's Rep. 329, in 6 Eng. Ex. Rep. 117, 120, 128: *Oliver vs. Court*, 3 Ex. Rep. 312, 334-5, from 8 Price, 127: *Keble vs. Thompson*, 3 Bro. C. C. 111: 5 Eng. C. R. 487: 6 Eng. C. R. 531: *Shipbrook vs. Hinchinbrook*, 11 Vesey's Rep. 252: 16 Vesey, 477: *Underwood vs. Woodham*, 1 Merivale's Rep. 712: 3 Swanst. Rep. 55.

R. C. Foster, for the defendant Scruggs, insisted, 1st. That he is only liable for the assets which came to his hands and for his own acts; the true rule being that each executor is liable only for his own acts, and for what he receives or applies, unless he hands over the money collected or received to his co-executor, or joins in the direction or misapplication of the assets, and that an executor joining in a receipt with a co-executor does not make him responsible only for so much as comes to his hands. 1 Pierre Wms. 81: *Fellows vs. Owen*,

1 Eden's Rep. 90: *Wisley vs. Clark*, 1 Piere Wms. 241: *Churchill vs. Hobson*, 2 Vernon's R. 570: *Murrill vs. Cox*, 4 Ves. 596: *Harvey vs. Blackman*, 1 Dallas, 311: Tollèr on Executors, 118: 5 John. Ch. R. 283: 7 John. 17: 19 John. 427: *Monahan vs. Gibbons*, 1 Scho. and Lef. 341: *Joyce vs. Campbell*, 2 Scho. and Lef. 230: *Doyle vs. Blake*, 2 Devereaux's Rep. 55, 60, 119: 4 Eng. Condensed Chan. Rep. 326: 4 Johns. 23; 11 Johns. 16, 21: 16 Johns. 272: 2 Day, 536: 4 Desaus. Ch. Rep. 65. The authorities that hold the reverse of this rule, are Prec. in Chan. 173: Amb. 218: 3 Atk. 584: 2 Bro. Ch. 114: 7 Ves. 186: 11 Ves. 319: 16 Ves. 479.

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2. Defendant Scruggs insists, that under the old rule charging one executor for the act of another, and for joining in a receipt, he would be responsible to creditors, but not to legatees and distributees of the testator. 2 Williams on Exrs. 1126: 1 Piere Williams, 241: 3 Bacon's Ab. 31: 2 Scho. and Lef. 239, 240: 1 Dallas, 311.

3. Defendant Scruggs insists that the executors are responsible to the administrator of Anthony Thomas, for his portion of the estate, and not to complainants.

4. He insists that complainants are not entitled to relief for any portion but the negroes alleged to be sold, because more than twenty-five years have elapsed from the time the cause of action accrued, none of the complainants laboring under disability. *Dickerson and others vs. Burton and others*, 3 Yerger's Rep. 212.

REESE, J. delivered the opinion of the court.

In 1805, Jesse Thomas, of the commonwealth of Virginia, made his last will and testament and died. The first clause of the will directed that his executrix and executors, or either of them, should sell as they might think fit, the land and plantation whereon the testator then lived, and the proceeds of the same, with a further sum, not exceeding four hundred pounds, should be by his executrix or executors, or either of them, laid out in a tract or tracts of land lying within the State of Tennessee, which said land so purchased should be to the use of his wife, the executrix, during her natural life, and

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that at her death, the land should be equally divided among his sons John Thomas, Anthony Haggart Thomas, and Nathaniel Haggart Thomas, and their heirs forever.

The bill charges that there was personal estate enough to pay all the debts and to raise the sum of four hundred pounds, to be invested in land in Tennessee as directed; that the executors sold the tract of land devised to be sold for a large sum of money; that a part of the proceeds was by them invested in the purchase of land in Tennessee as directed; but that a large portion of the trust fund they omitted to invest and retained in their hands.

The bill also alleges that after the death of the testator, and before the death of the tenant for life, Anthony H. Thomas, one of the devisees in remainder, died intestate; his personal representative is not before the court. The widow died before the filing of the bill. They claim two-thirds of the uninvested trust fund, and two-sixths of the other third, as the heirs at law of Anthony H. Thomas. The defendant, Phineas Thomas, has not answered the bill, and as to him it is taken for confessed.

The defendant Scruggs answers, that at the death of the testator he was residing in Tennessee, and some months afterwards went on to Virginia and qualified, the other executors having previously qualified, and before his arrival, sold the land mentioned in the will. He insists that so much of the trust fund as he received he expended either in the purchase of Tennessee lands, according to the trust in the will, or in payment of the debts of the estate, and argues that he is not liable beyond the amount he actually received. And whether his liability should be so restricted, constitutes the main question which has been discussed in the cause. It has been strenuously insisted, that as by the terms creating the trust, the concurrent act of the co-trustees was not made necessary to give validity to the transaction of either a sale or a purchase, they should not be made responsible for each other in either acting amiss or refusing to act. But the answer of Scruggs shows that he accepted this trust; that he entered upon its discharge by receiving a portion of the trust fund, and by purchasing a portion of the land directed to be

purchased. His answer itself shows that he violated the trust by misapplying the proceeds arising from the sale of the land to other purposes; and then the testimony of his co-trustee, Thomas, taken at his instance, establishes that he had equal control with himself over the trust fund arising from the sale of the land, and indeed that he received a larger portion of it than the witness Thomas did. Here then is a case of co-trustees receiving between them a trust fund, executing the trust in part by the purchase of lands, violating the trust by the palpable misapplication of the funds to other objects, and violating it also by omitting to carry into effect a positive injunction of the trust, in not vesting the balance of the fund in the manner directed. Scruggs, by having done so much, and by so far co-operating with Thomas, placed himself in an attitude to make him responsible for doing the whole. Thomas cannot say that, because Scruggs had some of the funds in his hands, and by the terms of the will, had power without his concurrent act to make a valid purchase, that he is not responsible, nor shall Scruggs be heard to say it. Both were guilty of a plain breach of trust, and they will not be permitted to say we have disobeyed the positive directions of the testator, but then we have divided between us the trust fund, and each may be held liable for the separate amount in his hands. No case can be found, it is believed, tending at all to sanction such a course.

This is a much stronger case than that of *Deaderick vs. Wharton's Executors*, (a) just determined by us. Here both the trustees violated their duty and the trust assumed by them, by acting as they should not have done, and by omitting to act as they should. From the proof, however, this extends only in the case of Scruggs, to the fund arising from the sale of the Virginia land. As to the four hundred pounds it does not appear that it came to the hands of Scruggs. The administration had for some time proceeded before he reached Virginia, and he seems only to have had joint action and control with Thomas, as relates to the proceeds of the real es-

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(a) Ante page 263.

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tate, and he professes to be ignorant, and there is no proof that he knew what had been previously received, or what debts had been paid. Thomas, however, against whom the bill is taken for confessed, must be held answerable for the whole trust fund, and Scruggs for the whole proceeds of the sale of the land in Virginia.

MOORE vs. WILSON's *Administrators*.

By the treaty of 1783, Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively, and those persons became aliens to the government to which they did not adhere.

Where it is shown that a native of Scotland was domiciled here before the close of the revolutionary war, *prima facie*, he is to be considered a citizen of the United States. If alienage is asserted, it must be proved that "he adhered to the British government."

Where a party was resident in the United States prior to the treaty of 1783, adherence to the British government, and not his foreign birth, constitutes him an alien.

By the provisions of the act of 1809, c 53, an alien resident in the United States, and next of kin to an intestate, who dies without issue, is entitled to inherit his estate.

The complainant filed this bill for an account of the personal estate of Thomas Wilson, deceased, and prays for a decree against the defendants for the amount in their hands. The complainant alleges, that she is the sister and only distributee of said Wilson. The defendants, in their answer, state that they do not know whether the complainant is the sister of said Wilson or not, and require proof. They also allege, that complainant was, at the time of Thomas Wilson's death, an alien, and that by operation of the act of 1809, c 53, she was not entitled, but was in fact excluded, if there were relations of the deceased residing in the United States,

who were citizens, and that the son of complainant, who was a citizen, was entitled if any person was. NASHVILLE,
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The proof in the case is voluminous. The court however were satisfied that complainant was the sister of Wilson. The proof also shows, particularly the deposition of William Ball, that complainant emigrated from Scotland to this country sometime about the year 1780, and was twice married to American citizens. There was no proof that she ever was naturalized according to the acts of Congress. It was also proved she has a son living who was born in the United States.

The chancellor was of opinion, that she was entitled to the relief prayed for in her bill, and decreed accordingly. From this decree the defendants appealed to this court.

J. Rucks and R. J. Meigs, for complainant. By the treaty of peace of 1783, Great Britain and the United States became respectively entitled as against each other, to the allegiance of all persons who were at that time adhering to their respective governments, and those persons became aliens to the government to which they did not adhere. 3 Peters Rep. 164, 242: 2 Kent's Com. 69: 2 Mass. 236, 244, note: 2 Bar. & Cres. 779.

If therefore complainant came over and joined us before the treaty of peace, they became aliens to England and citizens of America, for this right of election is well established. Vat. b. 1, c 3, § 33: 1 Dal. Rep. 58: 2 Do. 234: 20 John. Rep. 332: 2 Mass. Rep. 179, 236, 244, note: 2 Kent's Com. 49.

As there is no proof that she came over since the treaty of peace, this defence fails. But the act of 1809, c 13, puts this question at rest.

By the first section, the real and personal estate shall descend to the next of kin to the decedent, resident within the United States to the exclusion of aliens in a nearer degree. And if a person shall die leaving no relations within the United States, his estate shall go to the trustees, &c.

Now a resident may be an alien. The word alien is here used in contradistinction to the word resident. The meaning

NASHVILLE, is, if a man have relations residing in the United States, and nearer relations residing abroad, those here shall inherit.
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And this is made more plain by the latter part of the section, which gives the estate to the trustees only where there are no relations of decedent within the United States.

And this is confirmed and made more plain by the second section, which gives the non-resident twelve months to remove within the United States, and take the benefit of the naturalization laws, which if he fails to do the estate shall descend to the next of kin to the decedent resident within the United States. Our legislature went upon the ground that our institutions were so superior to all others that every resident was a citizen or would be. They could not brook the national disgrace of seizing the property of a brother for public use, and leaving his sister, who came over with him, to starve among strangers.

This is not a case where time operates as a witness against complainant, but the contrary. Her right but lately accrued; was but lately discovered; she is driven back to a distant period to prove it. The court will not require such proof as if the occurrence happened but yesterday. We however believe the proof is abundantly sufficient to establish the fact that she is the sister of Wilson.

Geo. S. Yerger, for defendant.

REESE, J. delivered the opinion of the court.

In this case there are two questions for our determination: 1st. Is Mary Ann Moore, the complainant, the sister and heir at law of Thomas Wilson, deceased? The evidence, we think, fully sustains her claim to heirship.

2d. Does the defence of the administrators, on the ground of the alienage, either of Wilson the deceased, or of the complainant, avail them in this case? It seems probable from the proof that the deceased and the complainant reached the United States from Scotland, their native country, and became residents and had their domicil here in and before the close of the revolutionary war and the formation of the treaty of peace of 1783, *prima facie*, therefore the said Tho-

mas Wilson and complainant were not aliens, for if as is said by Judge Kent "the course and prevailing doctrine now is, that by the treaty of peace of 1783, Great Britain and the United States became respectively entitled as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively; and that those persons became alien to the government to which they did not belong," those who impute alienage in this case, must show that Wilson adhered to the British crown in the contest. For such adherence, his residence being at that time within the United States, and not his foreign birth, would constitute him an alien, and upon those who impute alienage rests the burthen of proving such adherence. Besides, the complainant has resided since 1780 within the United States, and has been twice married to American citizens, and she therefore is not an alien.

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But by the provisions of the act of 1809, c 53, she can claim as heir of the deceased, whatever may have been her condition with respect to allegiance and citizenship. The decree of the chancellor in this case will be affirmed.

Decree affirmed.

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HILL vs. BOSTICK.

A note due to a bank, which is taken up by the proceeds of a note discounted to renew it, is in general extinguished.

A endorsed a note for B, which was about to fall due. B applied to A to endorse another note for the purpose of renewing the first, which A refused to do, C however agreed with B to endorse it, provided A should be held responsible as endorser on the first note. The first note was protested, and A duly notified; B, thereupon executed a note which was endorsed by C, with the express understanding between him and B, that A was to remain responsible. This note was discounted, and the proceeds of it applied to take up the first note. C then sued A as endorser on the first note: Held, that the first note was extinguished and A was not liable

If the holder of a note take a further security, and agree to give time, he thereby discharges the endorser or surety.

If no express agreement by the holder, to give time to the principal debtor is proved, yet if he take a collateral security payable at a future time, in the absence of proof to the contrary, an engagement to wait until the security becomes due will be implied.

This was an action brought by Hill, as surviving partner of the firm of F. Porterfield & Co., as the holder of a note of Joseph Litton, for \$787 56, dated 4th April, 1832, and payable at the office of deposit of the Bank of United States, at Nashville, four months after date, against Bostick, the first endorser. The declaration is in the usual form in *assumpsit*, and the pleas are *non-assumpsit*, payment, accord and satisfaction, &c. On the trial in the circuit court, it was proved that the note on which suit was brought was discounted in bank, and the proceeds, credited to F. Porterfield, the last endorser thereon. That at the proper time for discounting a note to renew said note, there was a new note executed by said Joseph Litton, for precisely the same amount, at four months, endorsed by H. R. W. Hill and F. Porterfield, discounted at the same bank, and that F. Porterfield was credited with the proceeds of this latter note, and that Litton at no other time had a note of about that amount discounted.

It was also proved by Joseph Litton, that the second note above mentioned was given on account of the first note, and

to renew it, and that the proceeds of the second note was applied to the payment of the first note. He also proved that in the account which F. Porterfield had against him, he was credited with the proceeds of the discount of the first note, and charged with the payment of it, and was credited with the proceeds of the discount of the second note, upon which Hill was an endorser. Litton also proved that the second note was made and endorsed by Hill before the first was protested, and that in fact said second note had been discounted before the first was protested. That an arrangement between himself and Hill was made in the absence and without the consent or knowledge of Bostick, and that it was a part of this arrangement, between Litton and Hill, that the first note at the proper time should be protested, and that Hill should hold Bostick responsible thereon, which protest was accordingly afterwards made. Litton also proved, that Bostick was his accommodation endorser on the first note, and that although he had not much credit, he had unincumbered property sufficient to pay the note for six months after it was protested, and that Bostick refused to endorse the second note. Upon these facts the jury, under the charge of the circuit court, returned a verdict for the defendant Bostick. A new trial was asked by Hill, which was denied. The charge of the court is stated in the opinion of the court.

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J. Campbell, for plaintiff in error. 1st. If the proceeds of the second note were intended to pay the debt due the bank, but were not intended to discharge the liability of the drawer or endorser of the first note, they still remain liable.

2d. If the proceeds of the second note legally belonged to, and was under the control of Porterfield, as most assuredly they were by agreement with Litton, in consideration of which, and of which only, Hill and Porterfield endorsed the second note, and he, Porterfield, took those proceeds and paid them in discharge of his own liability upon the first, and took up the first note as owner, then he, Porterfield, had his recourse upon the first note, and the court should so have instructed the jury.

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3d. If Porterfield had paid his own money in discharge of the debt due the bank, the presumption would be, that he paid it in discharge of his own liability upon his endorsement, and not in discharge of the liability of Bostick or Litton. If Porterfield stipulated with Litton before he endorsed the second note, that upon its being discounted he must have the proceeds as his own, to pay over to the bank, and he would not pay it over but in discharge of his own liability, in other words, that he would reserve his recourse upon the note and previous indorsement, then such payment by Porterfield, out of the proceeds of the note, is precisely the same thing in effect as though he had paid his own money raised from other sources.

4. By looking into the cases where renewals of notes are held to discharge the previous endorsers, it will be seen they all go upon the principal, that time has been given to the drawer of the note or acceptor of the bill. This is the rule that governs the cases and no other. See Chitty on Bills, 5 London edition, 371 *et seq.*, where all the authorities are collected.

To make the renewal in this case exonerate Bostick, it must be shown that the taking of the second note from Litton was giving time to Litton upon the first note. Now so far from this being done, so far from time having been given to Litton, the drawer of the note, Porterfield expressly reserves his recourse upon the first note; so far then from giving time, he expressly refuses to give time. Bull N. P. 271: *Gould and others vs. Robson & Keymer*, 8 East Rep. 576: *Walwyn vs. St. Quintin*, 1 B. and P. 656: *Reese vs. Remington*, 2 Ves. Jr. 540.

Taking an additional security will not discharge the debtor, *Sthrubrick's exor. vs. Russell*, 1 Dessaus. Ch. Rep. 315: *Green's ex r. vs. Warrington*, 1 Dessaus. Rep. 430: yet the judge in effect told the jury this would discharge the endorser. He says, if the second note was a new security given by Litton for the first debt, this would release Bostick. See also *Lynch vs. Reynolds*, 16 J. R. 41: *Hubly vs. Brown*, 16th J. R. 70: *English vs. Darley*, 2 B. and P. 61: 2 J. C. R. 560.

J. Marshall, for defendant in error. 1st. If the proceeds of the second note were applied by Porterfield or Hill to the payment of the first note, Bostick, the endorser is discharged thereby.

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2d. If the second note was given by Litton to renew the first note, or if it was taken as new security given by Litton for the original debt, Bostick is discharged, though Hill reserved the right to hold Bostick responsible, provided Bostick did not concur in the arrangement. The renewal of the note by the debtor, or the giving of a new security by him for the debt, discharges the endorser. 12 Wheaton, 554, *McLemore vs. Powell*: Chitty on Bills, (edition of 1836,) 441, 442, and the cases cited in the notes: Chitty on Bills, 444: 1 Yer. 145: Theobald on Principal and Surety, 203-4: 16 Johnson, 73, 42: 4 Wendel, 367: 9 Conn. Rep. 264: 2 Campbell, 179. Will the reservation of the right to hold Bostick responsible alter the rule? It is insisted, that it will not; the case of *Gould vs. Robson*, 8 East. 576: and *English vs. Darley*, 2 Bos. & Pul. 61, in note g: Chitty on Bills, 440, 441, are in point.

One of the reasons, that giving time to the acceptor of a bill or the maker of a note discharges the endorsers is, that the effect of such an arrangement between the holder and the maker or the acceptor, is that the maker becomes less active in endeavoring to satisfy the note than he otherwise would be, without such an arrangement, which inactivity operates to the prejudice of the endorser, should he remain bound. Chitty on Bills, 442.

If the reservation of recourse on the endorser, without his concurrence, has the effect of continuing his responsibility, as it is contended, then the endorser would suffer the prejudice of, without having the protection against such arrangement, and yet be equally as innocent, and need the protection equally as much as if no such recourse had been reserved. Theobald on Principal and Surety, 203, 204: *Russel vs. Berrington*, 2 Ves. Jr. 540.

3. An accord and satisfaction of the first note, discharges the endorser on it, that is, as between holder and maker. The renewal of the first note by Litton, or the giving the

NASHVILLE, second note as a new security by Litton for the original debt,
 December, 1837 is an accord and satisfaction of the first note. 1 Yer. Rep.
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4. The acceptance of the second note by Hill, for the debt specified in the first note, is a suspension of Hill's right to sue on the first note, until the second note reaches maturity. Chitty on Bills, 195: 2 Gill and Johnson, 403: 2 Br. C. C. 579: 6 Dow. Rep. 233: 2 Ves. 540: 3 Merivale, 272: Theobald, 132, 286, 287: and consequently discharges Bostick.

GREEN, J. delivered the opinion of the court.

This is an action of *assumpsit* by Hill, surviving partner of F. Porterfield & Co., as the last endorser of a note drawn by Joseph Litton, for \$787 56, dated 4th day of April, 1832, payable four months after date, at the office of discount and deposit of the bank of the United States at Nashville to the defendant John Bostick, who was the first endorser. This note fell due 4-7th of August, and was renewed by a note for the same amount, dated the 4th of August, and endorsed by Hill and Porterfield. When the first note fell due, Litton applied to Bostick to endorse another note to renew it, which he refused to do. Porterfield also refused to endorse, unless Bostick would become the first endorser. Hill afterwards agreed to endorse, provided Bostick should be held responsible on the first note. This was agreed to between Hill and Litton, and the first note was protested, and the necessary steps were taken to fix Bostick's liability. The second note was given to meet the first note, and Hill endorsed the second note upon condition, that he would hold Bostick liable on the first note. Bostick was absent and knew nothing about this agreement. The first note was paid by Porterfield, when it fell due, and was delivered to him by the bank, and he charged Litton with the payment, and afterwards credited him with the proceeds of the second note. The court, among other things, charged the jury that, 1st. If they found from the evidence that the second note drawn by Litton was discounted in bank, and the proceeds applied by Hill or Porterfield to the payment of

the note endorsed by Bostick, the endorser is discharged. NASHVILLE,
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 2. If they found from the evidence that the note endorsed by Bostick was not paid, but that the second note was given by Litton to renew the first, or that it was a new security given for the original debt by Litton, though the renewal was made or note given with a reservation to Hill or Porterfield, that Bostick, the endorser, was still to be responsible to Porterfield or Hill upon his endorsement on the first note; still, if the renewal was made, or the note given, without the concurrence of Bostick, he is discharged. 3. Or if, from the evidence you find that the holder of the first note contracted with Litton, the drawer, to give time and not to sue, and that contract was made upon a good and valid consideration in law, then the endorser would be discharged. To the first part of the charge, exception is taken, but we think without reason. The second note was drawn by Litton; Hill and Porterfield were his accommodation endorsers, and the note was negotiated for the benefit of Litton, and the proceeds applied to Porterfield, who had paid the first note. Then the judge was right in saying, that "if the proceeds of the second note were applied to the payment of the first, Bostick was discharged."

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The chief objection, however, is urged against that part of the charge contained under the second head. It is insisted, 1st. That the taking a new security does not discharge an endorser, unless time be given. 2d. That if such were the law in ordinary cases, where no stipulation was made, still that such would not be the effect in this case, because of the express stipulation that Bostick was to remain liable.

It is certainly true, that if the holder of a note take a fresh security and agree to give time, he thereby discharges the endorsers. If there be no express agreement for time, but a further security, payable at a future time is received, that would in general imply an engagement to wait till it becomes due. Chitty on Bills, 441-2, (8th edit.) The plaintiff's counsel attempt to show, and argue very ingeniously, that the second note was negotiated in discharge of Porterfield's liabilities only, and that both Litton and Bostick continued to be liable to him on the first note, and that he was under no ob-

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igation to wait with either the drawer or first endorser, having expressly stipulated that they should still remain liable on the first note. The facts of the case, however, do not justify this position. It is true there was a stipulation that Bostick was to remain liable, but there is no proof that such was the understanding as to Litton. He had drawn the second note, and when the money was received, he was credited on the books of Porterfield with the proceeds. So far from their being any intention to proceed against Litton, the very object of the second note was to give him time. Porterfield had paid the first note, the second note was negotiated for Litton's benefit, and the money that was raised on it, belonged to him. Porterfield so treated it, by giving credit for it on his books, thus applying it to the payment of the sum he had advanced on the first note. What claim, after this, could he have against Litton, upon the first note? We think none at all; at any rate, he could not have sued Litton until the second note fell due. It is true, if Porterfield had advanced his own money in payment of the first note, or if he had made any other arrangement, so that the liability of Litton should not be discharged or suspended, he might have preserved his remedy against Bostick. But according to the facts of this case, Porterfield had no right to proceed against Litton, until after the second note fell due, because the second note was executed by Litton to renew the first, and no such right was reserved in the contract with Hill, its stipulation having relation to Bostick alone. In this view of the case, Bostick the endorser is discharged, for although the execution of the second note by Litton might not extinguish the debt against him, yet it suspended Porterfield's remedy against him, until the second note was dishonored. Chitty on Bills, 195; (8th edit.) Theo. on Sur. 237-8.

The plaintiff's urge their claim to a recovery, principally upon the ground of the contract, that Bostick should still be held liable. The argument proceeds, however upon the supposition, that the legal effect of the whole arrangement was, that Litton and Bostick should both continue to be liable to be sued, at any time, upon the first note. This

it has been shown is a mistaken view of the facts and of the legal consequences from them.

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The question, therefore, is reduced to the consideration of the legal effect of the reservation of the liability of Bos-tick, the endorser, in the contract between Litton and Hill. We think this reservation could not effect the rights of the endorser. He was not present, nor assenting to it, and to say that he should be bound by it, would be to hold him to an obligation different from that to which he had assented, and would be inconsistent with the obligation of the surety. Theo. on Surety, 203-4. Upon the whole we think there is no error in this record, and that the judgment be affirmed.

Judgment affirmed.

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A, left blank endorsements of his name with B with a view to aid B in his business and to sustain his credit. No restriction was imposed as to the use to be made of them. B filled up a note with A's endorsement thereon, and passed it to C as a surety for an existing liability of B: Held that A was responsible to C upon such endorsement.

Where an endorsement in blank is left with A generally and without restriction, it is an assent by the endorser that A may pledge it as security for his existing liabilities, or use it any other way lawful and necessary for his accomodation and credit.

On the 9th July, 1834, Cantrell & Allen executed to Wm. Lytle their promissory note for \$3,000, due four months after date, payable at the office of discount and deposit of the bank of the United States in Nashville, for value received. This note was endorsed by Wm. Lytle and Fielding Deadrick, and negotiated to Joseph Kimbro, under circumstances hereafter stated. When the note fell due, it was duly protested for non-payment, and notice of the dishonor given to the endorsers, after which this suit was brought by Kimbro against Lytle and Deadrick, the endorsers, to recover the amount of the note from them as endorsers thereof, Cantrell & Allen having since become insolvent.

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The following are the circumstances under which, and the consideration for which the note was endorsed to the plaintiff. Kimbro was an endorser for Cantrell & Allen, on a note to John Shute, for \$1,500. When that note was about to come due, Shute was willing that it should be renewed if Kimbro would endorse it. Kimbro was sent for, and when he came to Nashville, Cantrell and Allen requested him to endorse the note. He replied that he was already an endorser on many notes for Cantrell & Allen, on one note to Ensley, (among others,) for \$3,000, and observed he would endorse the note to Shute for \$1,500, if Cantrell and Allen would get the name of Fielding Deadrick before him, and give him another note to secure him on the endorsement of the \$3,000 note to Ensley, which was agreed to. In consequence of this agreement, Cantrell & Allen gave Kimbro the \$3,000 note now sued on, with Lytle's name thereon as first endorser, and had the note for \$1,500 drawn payable to Fielding Deadrick, and by him endorsed as first and Kimbro as second endorser, which was delivered to Shute. Kimbro afterwards paid the note to Ensley, on which he was first endorser. Lytle was not present when the agreement was made with Kimbro.

The proof shows that Lytle was the general accommodation endorser of Cantrell & Allen in bank, that he from time to time left blank endorsements with Cantrell & Allen, to be used by them in their business, that the above note of \$3,000, delivered to Kimbro as collateral security, with Lytle as endorser thereon, was given without the knowledge of Lytle, that is, Allen, one of the firm of Cantrell & Allen, wrote the above note for \$3,000 on one of the pieces of paper left with Cantrell & Allen by Lytle, with his name endorsed in blank thereon. No consideration passed between Kimbro and Cantrell & Allen, other than is above stated.

On the trial of the cause in the circuit court, the plaintiff moved the court to instruct the jury, 1st. that if the note in the declaration mentioned, was endorsed by Lytle and Deadrick, for the accommodation of Cantrell & Allen, and no restriction was imposed by the endorsers upon Cantrell & Allen, as to the manner in which they should use it, then Cantrell & Allen would be authorised to pledge the note to Kimbro, to

indemnify him for a previous endorsement of a note of the same amount made by Kimbro for the accommodation of Cantrell & Allen, and if Kimbro received the note from Cantrell & Allen upon that consideration, he would be authorised to recover from the endorsers.

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2. If the note was endorsed by Lytle and Deadrick in blank, for the benefit of Cantrell & Allen, to be used by them for their own benefit, that would authorise Cantrell & Allen to pledge the note to Kimbro, to indemnify Kimbro for his endorsements or securityship for Cantrell & Allen, or for a liability incurred by Kimbro at the time he received the note, to Shute as stated in the evidence.

3. If Kimbro, at the time the note was transferred to him by Cantrell & Allen, became responsible for Cantrell & Allen on the note to Shute, and this was in part the consideration of the contract, this would be a negotiation of the note in the usual way of trade, and if Kimbro received the note upon the consideration stated in the testimony of William Allen, (which is the same before mentioned,) that would authorise him to recover from the endorsers.

Which instructions the court declined giving, but the court did instruct the jury;

1. That if Lytle and Deadrick were accommodation endorsers on the note sued on, as stated in the testimony, Cantrell & Allen could negotiate or transfer the note in the usual way of trade, but could not pledge it to Kimbro to indemnify him for a previous endorsement of a note made by Kimbro for Cantrell & Allen. That the pledging of the note for such previous liability was not a negotiation in the usual way of trade, and they could not pledge it to Kimbro to indemnify him for a previous endorsement made by Kimbro for Cantrell & Allen. That the pledging of the note for such previous liability, was not a negotiation in the usual way of trade and would not form a sufficient consideration to sustain this action against Lytle and Deadrick, the accommodation endorsers. That Lytle and Deadrick might have bound themselves upon the accommodation endorsement if they had agreed the note should be pledged to Kimbro, but unless they had so

NASHVILLE, December, 1837, agreed Cantrell & Allen could only negotiate it in the usual way of trade.

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2. That if the note was endorsed in blank by Lytle and Deadrick, for the benefit of Cantrell & Allen, and merely for their accommodation and left with them to be used by them for their own benefit, and this was all that took place between them, that would not authorise Cantrell and Allen to pledge the note to Kimbro as an indemnity for his previous endorsements or securityship for Cantrell & Allen, and Kimbro could not recover from the accommodation endorsers.

3. If Kimbro, at the time the note was transferred to him by Cantrell & Allen, became endorser for Cantrell & Allen on the note to Shute, yet, if this last note to Shute was given in renewal of a former one, for which Kimbro was bound as endorser, the transfer of the note under such agreement, would not be a negotiation in the usual way of trade, and would not authorise Kimbro to recover against the accommodation endorsers.

The plaintiff excepted to the opinion of the court in refusing the instructions asked for by him, and also for the instructions that were given. The jury found a verdict for the defendants. A new trial was moved for and refused, and judgment given for defendants, to all which plaintiff excepted, and prayed and obtained an appeal in the nature of a writ of error to this court.

J. Campbell, for plaintiff in error. The first proposition the plaintiff contends for is this, that "where the endorsers of an accommodation note lend their names to the drawer, without any limitation or restriction as to the manner in which the note is to be used, he has the right to apply it to the payment or security of an antecedent debt, or to sustain his credit in any other way." *Grandin vs. Leroy and Smith*, 2 Paige's Ch. Rep. 509: *Bank of Rutland vs. Buck*, 5 Wend. 66: *Bank Chenango vs. Hyde*, 4 Cowen Rep. 577, 575: *Powell vs. Waters*, 17 John. Rep. 176.

2. The cases most relied upon by defendants in error, do not militate against the principles I have laid down or the cases I have adduced in support of them. The leading case relied on by defendants, is that of *Bay vs. Coddington*, 20

J. R. 637, *et seq.* That was the case where the payee of a note, who was a mere trustee, having no beneficial interest in the note, pledged it for a debt of his own. That case so far from supporting the principle contended for here by defendants, makes directly against it. The trustee in the case of *Bay vs. Coddington*, committed a gross fraud in negotiating the note, and as he did not do it in the usual way of trade, but merely pledged it for a debt of his own, the person to whom the note was pledged could not hold it against the true owner.

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The case of *Napier vs. Elam*, 6 Yer. Rep. 108, is another case of the same description, where the holder of the note was guilty of a fraud and breach of trust in negotiating the note. So in the case of *Hunt vs. Sandford*, 6 Yer. Rep. 388, the holder of the note committed a fraud in trading the note, and the purchaser bought it under suspicious circumstances.

The case of *Wardell vs. Howell*, 9 Wend. R. 170, is distinguishable from this. That was a case where a note was given for a particular purpose, that is, to renew a former one, and the holder pledged it as collateral security to pay another and a different note.

The case of *Rosa vs. Bretherson*, 10 Wend. R. 85, says, that where the creditor receives the transfer of a note in payment of a precedent debt, he takes it though transferred before maturity, subject to all equities existing between the original parties. This case proves nothing against the proposition advanced by the plaintiff. The transfer of a note in payment of a precedent debt, says the case, is not a negotiation in the usual way of trade, but it cannot be pretended that an accommodation endorser in such a case is not bound upon his endorsement, except where a gross fraud has been practised upon him.

The case of *Kasson vs. Smith*, 8 Wend. R. 437, merely establishes the principle, that an accommodation note executed for one purpose, cannot be taken and applied to another purpose by a person cognizant of the circumstances.

The case of *Dickerson and others vs. Tillinghast and others*, 4 Paige's Rep. 215, was a case where a debtor gave

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John. Rep. 637: 9 Wend. Rep. 170: 10 do. 85: 11 do. 533: 12 do. 600-1: 13 do. 570, 605: 1 Paige's Ch. Rep. 131: 4 do. 215: 6 Ser. and R. 537: 4 Bin. 356: 6 Conn. R. 521.

In neither case was the note passed upon a sufficient consideration; no credit was given to it by which a debtor liability or loss accrued. To constitute the transfer of the note a negotiation in the usual course of trade, the credit must be given or the liability incurred at the time upon the credit of the note. If the holder is left in the same situation that he was before the transfer of the note, he cannot complain. 20 John. Rep. 637, 652, 657: 9 Wend. 170: 10 do. 85: 11 do. 533: 12 do. 600-1: 13 do. 570, 605: 1 Paige's Ch. Rep. 131: 4 do. 205: 6 Ser. and R. 537: 4 Bin. 366: 6 Conn. Rep. 521.

If a creditor receive a note as security for an existing debt or liability, merely endorsed in blank, this is such a circumstance as should put him upon his inquiry, and if taken by him without obtaining the consent of the endorser, will let the endorser into his defence of a want of consideration. See cases above cited.

It is true, that the consideration actual given can be recovered by the holder generally and no more. 13 John. Rep. 52: 7 do. 361: 15 do. 44: Chitty on Bills, 69, 70: *Hunt vs. Sandford and Cook*, 6 Yer. Rep. 387.

Yet if the circumstances were such as would have amounted to notice, no recovery at all can be had of the endorser. *Hunt vs. Sandford and Cook*, 6 Yer. Rep. 387: 5 Wend. Rep. 566: 3 Kent's Com. 2d ed. 80-1: 1 Eng. Ch. Rep. 556: 6 Yer. Rep. 108: 8 Wend. 437: 3 Pick. Rep. 5, 298: 5 do. 223.

II. It is argued that the endorsement of the \$1,500, to Shute, was a sufficient consideration for the transfer of this note.

1. This, to make the most of it, would only create a consideration for that sum, and being taken under the above circumstances, would let in the endorser to show the want of consideration in the whole. *Hunt vs. Sandford and Cook*, 6 Yer. Rep. 387.

2. But this is not even true. The Shute note already existed. Kimbro was already liable upon it. He did not be-

come so liable by reason of this note being transferred. It was an existing debt, and if this note was passed in order to continue that, it is still given to secure an existing liability. 20 John. Rep. 637: 9 Wend. Rep. 170: 10 do. 85: 11 do. 533: 12 do. 600-1: 13 do. 570, 605: 1 Paige's Ch. Rep. 131: 4 do. 205.

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3. The discharge of Lytle and Deadrick from this endorsement, still leaves Kimbro where he was when it was transferred, neither better nor worse. If left in this situation, he cannot claim to be a holder *bona fide* in the usual course of trade. 20 John. Rep. 637, 657.

III. It is argued that Kimbro but for the transfer of this note, would not have endorsed the note to Shute a second time, and could have secured himself, and that this is such credit given to the endorsement as will entitle him to recover.

1. The possibility or probability that a party would have obtained other indemnity, is not sufficient to make him a *bona fide* holder. 20 John. Rep. 637, 648: 12 Wend. 600-1.

2. The Shute note already existed, and his endorsement of it was a mere continuation of a pre-existing liability. 20 John. Rep. 637: 12 Wend. 600-1: 10 do. 85: 9 do. 170: 13 do. 570, 605.

3. The proof shows fully that this note was taken as a security on the Ensley note, and that Deadrick was to be placed first endorser to secure the Shute note.

IV. Whether the note was transferred to secure the Ensley or Shute debt, can make no difference. It was passed to secure or continue a liability that already existed, and as such cannot enure to the party taking it, with a knowledge of the circumstances. *Hunt vs. Sandford and Cook*, 6 Yer. Rep. 387: 20 John. Rep. 637: 9 Wend. 170: 10 do. 85.

REESE J. delivered the opinion of the court.

We consider the present case as submitting to our determination this general question, is one who becomes endorser upon a note for the accommodation of the maker, with a view to aid him in his business and to sustain his credit, and without enquiry or restriction as to the use to be made of it, liable to a holder, who received it from the maker as a security

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for existing liabilities? This question is answered in the affirmative by the present chancellor of New York, in the case of *Grandin vs. Le Roy*, 2 Paige's Ch. Rep. 510, in which he says, that if the complainants in the case "lent to F their endorsement without any restriction as to the manner in which it was to be used and without any inquiry, he had a right to use it in the way he had done, to pay or secure an antecedent debt, or to sustain his credit in any other way which was not illegal."

The chancellor in that case did not think that "the facts raised the question, whether an accommodation note made and endorsed for a particular purpose, and afterwards negotiated for another purpose to a third person with notice, or in payment or security for an antecedent debt, can be recovered against the endorser." The chancellor to sustain the principle, determined in this case, refers to the cases of the *Bank of Rutland vs. Buck*, 5 Wend. 66, and the *Bank of Chenango vs. Hyde*, 4 Cow. Rep. 566. In the former of those cases, the note was made by Spear and Everett, and signed by Buck as surety, payable to the bank; it was made to enable Spear and Everett to raise money for their own accommodation. Upon its being offered at the bank for discount, the bank refused to discount it, and it was subsequently and before it was due, delivered over to Honse and others, as collateral security for the payment of a judgment in their favor against Spear & Everett. The suit was brought in the name of the bank, but for the use of Honse and others. It was objected that the object for which the note was made, being to raise money from the bank, and that object having failed, it ought to have been returned to the surety. It was admitted, that if the bank refused to advance the money, and a third person had done so, as in the case of the *Bank of Chenango vs. Hyde*, 4 Cow. Rep. 567, the surety would have been bound, as the substantial object, the raising of money, would have been obtained. It was further objected, that the note was not received in the ordinary course of commercial business, and so as to be governed by the law merchant. But Ch. J. Savage, delivering the opinion of the court says, "I can see no well formed objection to a recovery upon this note. It was drawn

for the purpose of raising money for the accommodation of the two makers, Spear & Everett, who have had the benefit of it." He relies upon the case of *Powell vs. Waters*, 17 John. Rep. 176, and *Chenango Bank vs. Hyde*, as sustaining the case, and distinguishes it from the case of *Woodhall vs. Holman*, 10 John. Rep. 231, and the case of *Skelding vs. Hought*, 15 John. Rep. 274, upon the ground that a fraud was committed in putting the note in circulation in those cases;" and he adds, here had the plaintiffs obtained a discount at the bank, they might have paid the money to Honse & Co. and Buck's liability would have been the same, his situation is not changed, nor is there any fraud."

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Without further citation of cases, we think that upon the authority of the two cases above referred to, and those relied on to sustain them, so consonant to reason and to the objects and principles of commercial law, we too may answer the question with which this opinion commences, in the affirmative.

It is not denied, indeed it is admitted, that one who becomes endorser of a note for the accommodation of the maker, in the conduct of his business and to sustain his credit, without restriction or enquiry as to the use of the note, would be liable to the holder, who might receive it in payment of existing debts, or as a security for existing liabilities, if he had assented to such use of it. But does he not assent to this or any other use of it, lawful and necessary to the accommodation and credit of the maker, when he endorses it for his benefit generally, and without reference to any end more special, than that with it he might raise money to sustain credit? We certainly think him as much bound as if he had given his express assent. In this case, as in the that of the *Bank of Rutland vs. Buck*, it may be remarked, that if the money had been raised upon the note endorsed by Lytle, and the responsibility of Kimbro to Ensley extinguished by means of it, the liability of Lytle would have been just the same. His situation would not have been changed.

But it is contended that where one endorses a note for the general credit and accommodation of the maker, without restriction as to the purpose for which it may be used, still there is

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a restriction arising from the operation of the law merchant, which limits the responsibility of such endorser to the claim upon him of that holder only, who has received the note in the due course of commercial transactions, that is in other words, who has given his money for it, his goods or his credit, at the time of receiving it, or who then on account of it, sustained some loss or incurred some liability. To sustain this position much elaborate argument has been used, and many authorities, insisted upon as relevant have been cited. We deem none of them as resting upon grounds which will sustain the purpose for which they are relied on. They are of that class, where the note having been stolen or found, or fraudulently obtained, or fraudulently put into circulation, and the holder, innocent though he may have been, has received it, not in due course of trade as above explained, but as payment or pledge for a pre-existing debt or liability. Such was the great case of *Bay vs. Coddington*, 20 John. Rep. 637, so fully discussed and so well considered, which has carried the restrictions upon the negotiability of commercial paper to a point, where this court is willing to carry it and where it is disposed to leave it. Such also are the subsequent cases of *Wardell vs. Honell*, 9 Wend. R. 170: *Rose vs. Brotheson*, 10 Wend. R. 85: *Kosson vs. Smith*, 8 Wend. R. 637: *Clovell vs. The Tradesman's Bank*, 1 Paige's Rep. 131. In these cases, in general, there was some equity as between the original parties, arising upon the ground of fraud or other cause, which stood in the way of the holder, in collecting the note, because he had not received it in the due course of trade. But in this case as between the makers and the holder, the note was valid and founded on good consideration, and what equity, as it has been called, against the plaintiff, has Lytle, who endorsed the note for the credit of the makers to sustain them in their business, without enquiry or restriction as to its use, because they chose to give it to the plaintiff to secure him for his responsibilities in their behalf? We think he is not in the attitude in this transaction to enable him to resist the claim of the plaintiff, and thinking so on the general ground which we have stated, it is not necessary to look into the agreement between the makers of the note and the plain-

tiff, touching the endorsement by the latter of Shute's note, for the purpose of enquiring whether the plaintiff did not at the time of receiving the note sued on, give for it his credit and incurred a new liability.

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Upon the whole, we think that the judgment of the circuit court is erroneous, that it must be reversed, and a new trial of the cause be had, when the law will be charged conformably to this opinion.

Judgment reversed.

NICHOL, HILL & Co. vs. BATE.

No equities existing between the original parties to a note can be set up against a *bona fide* holder, when taken and received by him in a "due course of trade."

A note taken in "a due course of trade," is, where the holder has given for the note his money, goods or credit, at the time of receiving it, or sustained some loss or incurred some liability.

Where a note is taken in payment of a debt due and secured by endorsement of a third person, which last note is given up and discharged: Held, that the note is taken "in a due course of trade."

In all cases of notes endorsed, where one is fairly received in renewal of another, it discharges the first, and the second is taken "in the usual course of trade," and for a good consideration passing at the time.

This is an action of assumpsit against Bate, as endorser of a note of Rogan, Carr and Roberts. The proof shows that Rogan, Carr and Roberts owed Nichol, Hill & Co. an account, for which they had given them their note, with L. Winchester, as endorser; that the note had fallen due and been protested at Bank, and was taken up by Nichol, Hill & Co. That sometime thereafter they applied to Bate to endorse a note for them for a small amount, that Bate refused to endorse it, but was induced to endorse a blank note, upon its being represented to him that it was to be filled up for about \$600, to take up a note then about to fall due in bank, on which Bates was Rogan, Carr and Roberts' endorser; that

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Roberts, one of the firm of Rogan, Carr and Roberts, brought the blank to Nashville, and filled it up, or it was filled up by Thomas J. Read, the clerk of Nichol, Hill & Co. for about \$2600, to take up a note on which Winchester was endorser, and to secure an account that Roberts owed to Nichol, Hill & Co. and that the note on which Winchester was endorser was given up. This was all done without Bate being present or knowing anything of the matter. The court charged the jury, among other things, that if the note was taken out of the usual course of trade, without a sufficient consideration paid therefor at the time, that it would not be good against the endorser, although it might be good against the makers; that if it was filled up contrary to Bate's consent, for more than he had agreed upon, and was passed to pay a debt of Roberts then due, and not contracted upon the faith of the note; or if it was passed to discharge a debt of Winchester, not contracted upon the faith of the note, the consideration would not be such as would entitle the holder to recover, as it would not be taken in a due course of trade. The jury found a verdict for the defendant. Motion for a new trial was overruled, and an appeal in the nature of a writ of error prosecuted to this court.

F. B. Fogg and *J. Campbell*, for plaintiffs in error. We think the judge erred in his charge. The note was an accommodation note, so far as regards the maker and the defendant, and was wholly ineffectual as between them until the maker passed the note for value. See *McDonald vs. Magruder*, 3 Peters, 470. The first endorser by endorsing his name in blank gave credit to the note, made the maker his agent to fill it up in favor of a *bona fide* endorser to any amount, and when that second endorser paid the note, he stood precisely in the situation of the holder, who had advanced the money in the first instance. See the following cases: *Russell vs. Langstaff*, Douglass, 514: *Violet vs. Patton*, 5 Cranch, 142: *Pulnam vs. Sullivan*, 4 Mass. Rep. 45: 2 Paige's Rep. 509, 27: E. C. Law Rep. 234: 5 Barn. and Ad. 909: Chitty, 33.

J. S. Yerger, for the defendant in error, made the same

points and cited the same authorities which he relied on in the case of *Kimbrow vs. Lytle*. He however, remarked in addition,

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1. The authorities proved that where the endorsement was in blank, and without restriction, to charge the endorser the note must be negotiated for a consideration passing at the time; that if this be not so, yet if the endorser restricted the note to be discounted at bank for a particular purpose, and the maker divert it from its original design, and fraudulently put the note in circulation, the case is much stronger, and the right of the holder to recover is destroyed, if he advanced nothing on the faith of the note, but received it in payment, or as security of a pre-existing debt. He must have received it in good faith, in the ordinary course of trade, and have paid for it a valuable consideration. 10 John. Reports, 231: 15 John. Reports, 270: 5 Wend. 66, 566: 6 Wend. 615: 17 John. Rep. 176: 4 Cowen, 567: 8 Wend. Reports, 437: 9 Wend. Rep. 172: 2 Paige's Ch. Rep. 209, and the authorities cited in those cases: 10 John. Rep. 198.

Here the design of Bate was to endorse a note on which money was to be raised to take up a note on which he, Bate, was an endorser, but Roberts fraudulently diverted the note from its original design, and applied it in payment of his own debt, which already existed and was not created upon the faith of this note.

2. But it is argued that the giving up the note on which Winchester was endorser, released Winchester, and was a sufficient consideration for the promise, and was a taking in the course of trade. This is not so, because,

1st. There is no evidence which shows that notice of protest was ever given to Winchester. If this was not done, Winchester was discharged, and nothing was given up which will form a sufficient consideration. 12 Pickering's Rep. 399.

2d. The note on which Winchester was endorser was given up after it was due, and if he had notice of its non-payment, was the debt of Winchester as well as Roberts. If Roberts could not transfer the note, under the circumstances, in payment of his own debt, he could not in payment of the

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December, 1837. this note. See cases above.

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3d. The circumstances were such as should have aroused suspicion, and therefore entitle Bate to set up the want of consideration. The note was taken in fraud of him. 1 Eng. Ch. Rep. 550: 6 Yerger's Rep. 387: 2 Kent's Co. 2d ed. 80, 81: 5 Wendal's Rep. 566: 8 Wend. Rep. 437: 3 Pick. 5, 298: 5 Pick. 223: 10 Wendal, 85: 9 Wendal, 170.

4th. The giving up the note of Winchester does not release him, if his liability was fixed by proper steps. It is not giving up a security for the debt, occasioning a loss, as a pledge for instance. If the parties do not recover of Bates any part of this note, or if the note now sued on was not paid, they were remitted to their remedy against Winchester in the same way that they were against Roberts, and consequently formed no consideration. 2 John. Rep. 455: Chitty on bills, 8 ed. 441, 442: 5 Wendal, 490: 3 John. C. R. 71: 7 John. R. 311: 8 Connecticut Rep. 472: 9 Con. Rep. 23: 2 Gill and J. 493: 2 Hawks Rep. 326: 4 East, 147: 1 M'Cord, 449: 2 Stark. Ev. 2d ed. 594, note 1: 1 Cowen, 290: 9 John. Rep. 310: 2 Eng. Co. L. R. 118: 5 John. Rep. 68: 1 Yerger's Reports, 151, 154-5: 6 Yerger's Rep. 52: 2 Bos. and P. 518.

5th. The demand against Winchester was merely suspended, not released. 2 Stark. Ev. 2d ed. 596, note 1: 8 John. Rep. 389.

6th. The only liability Winchester was under was for money paid and advanced for him. This could not be paid by Bate's note any more than the same demand against Rogan, Carr and Roberts.

TURLEY, J., delivered the opinion of the court.

After the determination of the two cases of *Kimbro vs. Lytle* and *Hill vs. Bostick*, at the present term of this court, there remains but little to observe upon, in the case now under consideration. In the case of *Kimbro vs. Lytle*, we have recognized the authority of the case of *Bay vs. Coddington*, 20 John. Rep. 637; and the question now is, does the present case fall within the principles therein determined.

In that case, notes were fraudulently passed by an agent to secure the defendant against responsibilities assumed by him as endorser of his notes, and it was held, that the notes not being received in the usual course of trade, nor for a present consideration, the defendant was not entitled to hold them against the true owner. What is the present case? Nichol, Hill & Co. were the last endorsers on a note drawn by Rogan, Carr and Roberts, in favor of Lucillius Winchester, payable in the United States Bank, at Nashville. The note, at maturity, was protested for non-payment, and taken up by Nichol, Hill & Co. After this was done, Rogan, Carr and Roberts offered to Nichol, Hill & Co. their note, endorsed by the defendant, H. Bate, for the purpose of renewing the previous note, which was received by them, and upon their endorsement, discounted in bank. This note, at maturity, was also protested for non-payment, and taken up by Nichol, Hill & Co. who are now prosecuting this suit against Bate, the first endorser. There is no doubt that the note was endorsed by Bate, when it was blank, and that in filling it up for the amount and for the purpose for which it was used, a gross fraud was practiced by the drawers upon Bate, who only intended to endorse a note for \$600, to renew one on which he was already liable for Rogan, Carr and Roberts, as endorser; but it was equally true, that Nichol, Hill & Co. were no participators in the fraud, and that they had no cause to suspect the honesty of the transaction. The only question then is, did Nichol, Hill & Co. receive the note in the due course of trade, or for a present consideration. We are of opinion that they did. In the case of *Kimbrow vs. Lytle*, this court has said that due course of trade is where the holder has given for the note his money, goods or credit, at the time of receiving it, or has, on account of it, sustained some loss, or incurred some liability. To apply this principle, Nichol, Hill & Co. were the last endorsers of the previous note, Lucillius Winchester was the first, and as such, responsible to them. When the new note, endorsed by the defendant, was presented, it was taken by the plaintiffs in discharge of that responsibility, and that it was a full and complete discharge, this court has, at the present term, in the case of

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Hill vs. *Bostick* determined. This constitutes a marked difference between this case and that of *Bay* vs. *Coddington*; there the notes were given as collateral security for liabilities incurred as endorser, here it was given in payment of a debt due and secured by the endorsement of Winchester; there the notes could be appropriated to the true owner, without placing the person to whom they had been endorsed in a different situation from that which he would have occupied if he had never received them, for we cannot deprive Nichol, Hill & Co. of their recourse against the defendant, without depriving them also of the ample security for the payment of them, in the endorsement of Winchester, and which they gave up when the last note was received. In short, in all cases of notes endorsed, when one is fairly received in renewal of another, it discharges the first, and we think it has been taken in the usual course of trade, and also for a good consideration, (if that were necessary,) passing at the time. The present case then, is not within the operation of *Bay* vs. *Coddington*, and the law as applicable to the rights of the plaintiffs, has not been correctly stated by the court below. The judgment must therefore be reversed and the cause remanded for a new trial, when the law will be charged in conformity with this opinion.

Judgment reversed.

GRIFFITH vs. BEASLY.

An action will not lie in this State against the executor of an executor, for a *devastavit* committed by the latter.

A judgment was obtained against A as executor of B. A died, and appointed C his executor: Held, that an action of debt, suggesting a *devastavit*, would not lie on the judgment against C as executor of A.

This was an action of debt brought by Barnet Beasly, against Mary Griffith and Benjamin B. Griffith, executor and executrix of Samuel Griffith, deceased. The action was founded on a judgment recovered by said Beasly against said

Samuel Griffith in his lifetime, as executor of John Griffith, deceased. The declaration, after stating the recovery of the judgment, and the death of Samuel Griffith, averred that said Samuel, at the time the judgment was recovered against him as executor of John Griffith, had unadministered assets of the said John's estate sufficient to pay said judgment, but that the said Samuel failed to pay the judgment and wasted the assets.

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Several pleas were filed, upon some of which issue was taken and the issues found for the plaintiff below.

To those of the pleas not replied to, the plaintiff demurred. Several questions were raised and argued upon the pleadings; but as the demurrer to the pleas operated as a demurrer to the declaration, and the opinion of the court is confined to the plaintiff's cause of action, as stated in the declaration, it is deemed unnecessary to state them. The circuit court rendered a judgment for the plaintiff, from which a writ of error was prosecuted to this court.

J. Campbell, for the plaintiff in error, contended, 1st. That at the common law no action would lie against the executor of an executor, for a *devastavit* committed by the latter. A *devastavit* was a personal *tort* or wrong, which died with the person. He cited 2 Levintz Rep. 120: 2 Williams on Executors 1063, 1223, 1235, and authorities there cited.

2d. That the statutes of 30 Ch. II, c 7, and 4 and 5 William and Mary, c 24, § 12, which authorizes an action of debt to be brought in such case, is not in force in Tennessee.

R. C. Foster, for defendant. 1. The representatives of the intestate or testator are liable at common law for *torts* arising from malseasance or non-feasance of a duty or contract. 3 Bacon's Ab. 96, 97, 98: 2 Will. on Executors, 1064.

2. The defendants are liable as the executors of S. Griffith, because by the first judgment the plaintiff's debt was established, and assets found in the hands of S. Griffith sufficient to pay it, and therefore the original judgment became a debt due by S. Griffith as much as if he had given his note. 1 Saunders, 217.

3. At the common law the administrator or executor gave no bond to the ordinary. By the statute of Tennessee a

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bond is given by which a contract is formed between the representative and the legatees and creditors; and the power to act as administrator or executor does not attach until such bond is given, and for the violation of that contract, even by the common law the executor of an executor is liable, though a *tort*. 1 Will. on Executors: Acts of 1715, c 48.

4. That the securities of S. Griffith are liable under the bond for the *devastavit* of S. Griffith at common law, none can doubt. Upon what principle of law or reason then can the representatives of S. Griffith be held irresponsible? The liability of the securities arises under the contract, and from the non-performance of that contract by the principal, and if so, are not the representatives of the principal liable for the non-performance of the same. 3 Bacon's Ab. 96.

5. The various acts of the legislature in relation to the duties and powers of executors and administrators, radically changing the common law, necessarily create new liabilities and causes of action which are cognizable in courts of common law, for whenever the law creates a duty or an obligation it will give a remedy at common law for the non-performance of that duty, or violation of that obligation.

6. The act of 1836, c 77, liberally construed will give the action.

7. By the 30 Ch. II, c 7, this action is expressly given, and that statute having been passed previous to the years 1715 and 1778, is in force in this State.

GREEN, J. delivered the opinion of the court.

The defendant in error prosecuted an action of covenant against Samuel Griffith, administrator of John Griffith, and recovered a judgment. Samuel Griffith then died, leaving a will wherein the plaintiffs in error were appointed executor and executrix, and they have qualified as such. The defendant in error then brought this action of debt upon said judgment, suggesting a *devastavit* of the estate of John Griffith, by his administrator, Samuel Griffith, the testator of the present defendants. Several questions arise upon the pleadings, and have been debated at the bar, which it is unnecessary now to notice.

The plaintiffs in error insist that there is error in the judgment against them, because this action is for a *tort* committed by their testator, for which no action will lie against them. It is a principle of the common law that where an action arises *ex delicto*, and the declaration imputes a *tort* done, either to the person or property of another, and the person by whom the injury was committed, dies, no action for such injury can be brought against his executor or administrator. 2 Williams on Executors, 1063-4: 1 Saund. 216, a note (1.)

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"So," says the author above referred to, "at the common law, if a man was appointed an executor, and committed a *devastavit* and died, the executor of such executor was not liable for the *devastavit*, upon the principle that it was a personal *tort* in his testator, which died with the person." 2 Williams on Ex. 1064: 3 Leon. 241. This defect of the common law was remedied by the statutes, 30 Char. II. c 7, and 4 and 5 W. and M. c 24, § 12, so that since these statutes, if a judgment be recovered against an executor, who afterwards dies, an action may now be brought against his executor or administrator suggesting a *devastavit* by the first executor. Statutes at large, 3 volume, 532. But these statutes are not in force in this State, there being no evidence that they were ever in force and use in North Carolina. The common law principle above stated must be considered as existing in full vigor, unless it has been changed by some statute of our own. This we think has not been done. Our statutes regulating the duties and liabilities of executors and administrators, do not affect this question. It is insisted, that because our statutes require the executor to give bond for the faithful performance of his duties, which he thus by contract undertakes to do, that his non-performance is a breach of his contract, for which this action will lie. It is true, his bond is a contract upon which an action will lie against his executors for a breach of any of its conditions. But this does not alter the nature of a *devastavit*, and convert it from a *tort* into a contract. This suit is not upon the bond, but for the wrong done in wasting the estate of John Griffith.

It is true that Samuel Griffith was fixed with assets by the judgment against him, but it did not necessarily follow that he

NASHVILLE, had committed a *devastavit*, or could be made personally liable. If an administrator pleads a plea that admits assets, and it be found against him, the judgment is to be levied of the goods of the intestate, &c. and is conclusive to show that he has assets to satisfy it.

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If no goods can be found which were of the intestate, or not enough to satisfy the judgment, an action of debt may be brought upon the judgment suggesting a *devastavit*, and a judgment rendered against the administrator *de bonis propriis*. But the administrator may defend himself in such suit, (if the fact be so,) by proving that there were goods of the intestate which might have been taken in execution. 2 Williams on Ex. 1225.

It follows from these principles that the judgment against Samuel Griffith did not become his debt, or necessarily create a personal liability. He could only have been made liable in an action against himself, had he lived, by proving that he had wasted the goods of his intestate. Hence the *devastavit* charged in the declaration is the gist of the action, and being a *tort*, it will not lie against his executors.

It may be that there were goods of John Griffith remaining in specie at the time of Samuel Griffith's death amply sufficient to satisfy this judgment. If so, such goods would rightfully go into the hands of the administrator *de bonis non* of John Griffith, and while this action seeks to charge the estate of Samuel Griffith, there may be goods enough which are primarily liable to satisfy the judgment.

The judgment of the court below is therefore erroneous, and must be reversed.

Judgment reversed.

JEWELL AND MCKEE vs. BLANKENSHIP.

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Where parties to a suit submit it and the cause of dispute involved in it to arbitration, and the submission is not made a rule of court, such submission operates as a discontinuance of the suit.

This was an action commenced in the circuit court of Wilson county. After the cause had been some time pending, it was submitted to arbitrators. No rule of court was made for that purpose. The defendants below pleaded *pais darrein* continuance, that the plaintiff below, and Jewell for himself and McKee by their bond, submitted the matter in dispute, then pending in court, to five disinterested neighbors. The plaintiff replied, that the arbitrators had taken the case under consideration, and refused to decide it. To this replication defendants demurred. The court overruled the demurrer. The defendants then moved a discontinuance of the suit, which motion was also overruled. The plea shows that there was no time limited in which an award was to be made.

J. S. Yerger, for plaintiffs in error. 1. If a submission of a cause then pending be made by bond, and the proviso limits no time in which the award is to be made, the submission may be pleaded in bar of the further prosecution of the suit. Kyd on Awards, 96, 389: Do. 383, 387, 388: Watson on Arb. 147: Laws on Plead. 493: 2 Esp. Rep. 504: 9 East. 497: 1 Chitty on Plead. 651: 2 Do. 469: 13 Wend. 293.

2. The submission to arbitrators is a discontinuance of the cause, and may be so relied on by the defendant's plea. It is a voluntary withdrawal of the suit from the jurisdiction of the court. 13 Wend. Rep. 293: 1 John. Rep. 315: 18 Do. 22.

3. Though McKee was not a party to the bond, yet he may plead the submission of his co-defendant as an agreement in bar of the action. Kyd on Awards, 388, 389: 1 Young and Jarvis, 19: 1 Harrison's Dig. 121.

4. If after the reference the arbitrators refuse to decide, this does not prevent the discontinuance, it is the submission

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the arbitrators does not revoke the submission. If the submission be by bond, by a deed also must it be revoked. 5 Bar. & Ald. 507: 8 John. Rep. 125: 2 Pertersdorf's Abr. marg. 121: Kyd on Awards, 30, 31: Watson on Arb. 16, 17: 16 John. 205: 1 Cowen, 335: 3 Hay. Rep. 42.

If the submission discontinues the suit, a revocation the most formal cannot reinstate it in court. 13 Wend. Rep. 293.

R. L. Caruthers and R. M. Burton, for defendants, cited and relied on *Elliot vs. Wilkerson*, 8 Yer. Rep. 411.

REESE, J. delivered the opinion of the court.

The only question presented by the record, for the consideration of the court is, whether the parties to a suit having by bond, and not by rule of the court, submitted the action, and the cause of dispute involved in it, to arbitration, such reference shall have the effect to discontinue the suit? And we think it has such effect. If parties having a suit in court, by their own voluntary act, submit the action and cause of action to another tribunal, selected by themselves, and do not choose, by making their submission a rule of the court, to continue its jurisdiction over the cause, and to subject the arbitrators and their action to the control of the court, the jurisdiction of the court has been determined by their own act, and the cause will be discontinued. This seems to be so upon principle, and it is so also upon authority; see the case of *Green vs. Patcher*, 13 Wind. Rep. 294, and the cases there referred to. The judgment of the circuit court will therefore be reversed, in overruling the demurrer of the defendants to the replication of the plaintiff to the fourth plea; and this court proceeding to give such judgment as the circuit court ought to have given, sustain the demurrer, and give judgment for the defendant below, that he go hence and recover his costs, &c.

Judgment reversed.

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WHITE vs. PURYEAR.

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Puryear

Where by a rule of court, a cause is referred to arbitration, and no time is limited within which to make the award: Held, that an award made and returned the second term after the order was made is valid.

If a time be fixed by a submission, either by contract or rule of court, within which to make the award, the arbitrators have no power to act after the time elapses.

If no time be limited within which to make an award, the arbitrators may act at any time until their authority is revoked.

No counsel appeared for plaintiff in error.

Geo S. Yerger, for defendant.

GREEN, J. delivered the opinion of the court.

At the June term, 1836, of the Giles circuit court, the following order was made, viz. "By consent of the parties by their attorneys, all the matters in difference between them in this suit are referred to the final determination of Charles C. Abernathy, whose award thereupon, is to be made the judgment of the court, and the same is ordered accordingly." At the February term, 1837, Abernathy returned to court his award, by which he decided that the plaintiff in error, who was defendant below, was indebted to Puryear \$109 76, which award was confirmed and made the judgment of the court. There was no notice taken of the cause at the October term, 1836, and the question is, whether the power of the arbitrator to make the award, expired at the succeeding term, after the submission was made a rule of the court.

We have no statute upon the subject of arbitrations, and must therefore be governed by principles and the usage of the courts in settling the practice on the subject.

In England before the passing of the Statute of the 9th & 10th Will. c 3, § 15, the courts were in the practice of referring causes to arbitration by rule of court. Watson on Arb. and Aw. 25. The courts of this state have been constantly in the habit of making such references, and so far as we are advised, of acting afterwards upon the subject accord-

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ing to the terms of the order. Most usually, the order making the reference, directs the award to be returned to the next term of the court. In such case, if no award be made, the order is considered as no longer obligatory, and may be set aside at the instance of either party; or if the agreement to arbitrate still continue, an order extending the time of making the award is made. This practice would seem to follow from the character of the submission. The parties in agreeing to the rule of court, limit the time within which the arbitrator may act, and as all his power is derived from the agreement of the parties contained in the rule of court, it follows, that his award cannot bind them, if made after the time limited in his power. This view of the subject is supported by the authority of the supreme court of Massachusetts. The statute of that state directs, that the awards be returned to the succeeding term of the court, after the submission. Upon this statute it is determined, 1 Mass. Rep. 23, that an award made after the term, at which it should have been presented, is not binding upon the parties. But as the decision is placed expressly upon the requisitions of the statute, it would seem to follow, that if there were no statute, and the submission contained in the rule of court, were indefinite as to the time within which the award should be made, the arbitrator would have power to act at any time, so long as the submission remained unrevoked. Either party may countermand the authority of an arbitrator at any time before the award be made, whether the submission is by rule of court, or by a contract of the parties. Watson on Arb. and Aw. 16. But although the arbitrator's authority would be determined by such revocation, yet, if made contrary to, and in violation of the agreement of submission, an action will lie on the submission against the party revoking. Ib. 23. If the revocation be of a submission which has been made a rule of court, it has been held a contempt of court, for which an attachment might issue against the party. Salk. 73.

But if no time be limited in the submission for the arbitrator to make his award in, if the arbitrator, after request, neglect or refuse to make his award within a reasonable time,

either party may revoke the arbitrator's authority. Wat. on NASHVILLE,
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It seems from these principles and authorities that if there be a time fixed in the submission, whether it be by rule of court or contract, within which the award is to be made, the arbitrator has no power to act after that time elapses; but that if no time be limited in the submission the arbitrator may act at any time, until his authority is revoked. In the present case there is no time limited for making the award, and the authority conferred on the arbitrator remaining unrevoked, he had power to make the award at the time it was done, and it was properly made the judgment of the court. Kid on Awards, 26, 27. Affirm the judgment.

Judgment affirmed.

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HOOVER'S *lessee* vs GREGORY AND WIFE.

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In the construction of a will the court, in endeavoring to arrive at a knowledge of the testator's intention, must take into consideration the circumstances as they existed at the time the will was made.

If the court is satisfied from the language of a will what the testator's intention was when he made it, such intention must prevail, how different soever the circumstances of his family may have afterwards become.

A testator devised a house and lot to his daughter, the rents of which were to be appropriated to her maintenance and education, but if the house rented for more than was necessary for her support and education, whatever surplus there was over, he gave to his wife and only son. He then devised the residue of his estate "equally between his wife, and two children aforesaid." He next appointed his executors, and then follows this clause, "I do further will, that if my said daughter should die before she is of age and without issue, her estate herein devised to go to the survivor." Held, that the testator meant by this the survivor of his two children, and that upon the death of both, without issue, the wife surviving, she was not entitled to the property devised to the daughter.

Where a person takes the same estate in land by a will, which without the will he would have taken by descent, he will hold the estate by descent and not by devise.

Where lands descend to a child from the father, the mother will not, upon the death of the child without issue, be entitled to a life estate in the land by operation of the act of 1784, c 22, § 7.

This is an action of ejectment brought by the heirs of Sarah Elizabeth Hoover, to recover possession of a house and lot in Nashville, in possession of Gregory, who married the mother of Sarah Elizabeth Hoover. The facts of the case were agreed upon by the parties, and are set forth and stated in the opinion of the court. The circuit court gave judgment for the defendants.

J. Campbell and Geo. S. Yerger, for plaintiffs in error.

1. The first question to be considered is, what estate did Sarah Elizabeth Hoover take in the property in controversy? She was the only child and heir of her father, that survived him, of course she took precisely the same estate under the will that she would have taken without it. The fact of the support and education of Sarah Elizabeth, and

the support of the mother being charged upon the rent of the house and lot, for a limited time, makes no difference, Sarah Elizabeth was still in possession as heir, and not as devisee. 1 Salk. 242: 2 Ld. Raymond, 829: Plowd. 545: 6 Cruise's Dig. 135, from §1-8 and 13: 2 Str. 1270: Cro. Eliz. 431: *Doe vs. Temming*, 1 B. and Alderson, 430: *McKoy vs. Hendon*, 3 Murph. 209.

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2. If Sarah Elizabeth Hoover is in by descent, the question is settled that the lessors of the plaintiffs are her heirs, by the case of *Roberts vs. Jackson*, 4 Yer. Rep. 308: same point, *University vs. Halstead*, 2 Tay. Rep. 406: 2 N. C. L. Reps. 406: *Doe vs. Shepard*, 3 Murph. 353: *Wiley vs. Sawyer*, 1 Murphy, 493: *Hilliard vs. Moore*, 2 N. C. L. Rep. 599: *Butler vs. King*, 2 Yer. Rep. 115.

3. But even supposing Sarah Elizabeth Hoover held by devise from her father, the paternal and not the maternal kindred are the heirs. See acts of 1784, c 22, and October, 1784, c 10, Caruthers and Nicholson Revisal, 247 to 249. The principle here contended for is clearly settled by the principle decided in the case of *Roberts vs. Jackson*, 4 Yer. Rep. 308. If the father give land to his child, and the child dies without issue, or brothers and sisters, the father inherits, and not the mother, by the express provision of the 7th section of the act of 1784, c 22, and the cause of this express provision was, that it was the object of the act to keep the estate in the blood of the acquiring ancestor. So if the father died intestate, the lands that descended to his child shall never be inherited by the mother. *Jackson vs. Roberts*, 4 Yer. Rep. 330.

4. The defendants in error say, supposing all this is so, yet Philip Hoover, by the last clause in his will says, "I do further will and devise, that if my said daughter should die before she is of age, and without issue, her estate herein devised, to go to the survivor." They say that the word survivor, in this clause, includes the mother—that she is the survivor, and entitled to take under the will. The plaintiff contends, that as the brother as well as the mother of Sarah Elizabeth Hoover were alive when the will was made, the language of the will is to be interpreted, according to the

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state of things then existing. If the son, James Priestly Hoover, had been alive when his sister died, no person would hesitate to say he was the person intended to be included in the word survivor. The circumstance of his dying after the will was made, and before his father, cannot alter the meaning of the word survivor. Suppose it were equally uncertain to which this word survivor applied, the mother or the son, the son being the nearest in blood and entitled to the inheritance according to the statute of descents, is the one to whom the law would make the application of the word survivor. The statute of descents and distributions are statutory wills. When a party fails to make a will, or to devise a piece of property, the law disposes of it as it supposes the ancestor himself would dispose of it, if he had made a will, and hence, wherever a clause in a will is doubtful, having one meaning in conformity with the statute of descents, and the other opposed to it, and it is equally uncertain which was meant, the words of the will, fitting either interpretation, the court will adopt the construction that it is in conformity with the statute of descents and not that which is opposed to it. See the case of *McKinney, Pearce and others vs. James Davis and others*, decided at Sparta.

The counsel also contended, that the limitation to the survivor was too remote, it means an indefinite failure of issue and was void; but as the case was decided on other grounds, the argument on this point is omitted.

W. Thompson and E. H. Ewing, for defendants, contended, 1. That the limitation in this case to the survivor was good as an executory devise—that the testator did not mean an indefinite failure of issue, because the general words “die without issue” were restricted by the terms of the will. *Anderson vs. Jackson*, 16 John. Rep.: 2 Mass. Rep. 67: *Claiborn vs. Lewis*, 5 Yer. Rep. 469: Fearn on Remainders, 106, 160, 149, 153, 444: *Purefry vs. Rodgers*, 2 Saunders Rep. 388: *Porter vs. Bradley*, 3 T. Rep. 146: *Roe vs. Jeffry*, 7 Term. Rep. 596: *Pells vs. Brown*, 2 Cro. Rep.: *Fisdick vs. Cornelle*, 1 John. Rep. 440: *Jackson vs. Blaham*, 3 John. Rep. 12: *Moffat vs. Strong*, 10

John. Rep. 12: *Jackson vs. Staats*, 11 John. Rep. 397: NASHVILLE, December, 1837.
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2. That if the limitation to the survivor is good, then the property vested in the testator's wife. That his wife and children were all the objects of his bounty, all were mentioned as devisees in the will, and that his intention was to give the property to the survivor of the three; and as she is the survivor, the express words of the will give her the property. They cited on this point *Powel on Devises*, 426.

3. That if they were mistaken upon the construction of the will, and the property vested in Sarah Ann Hoover absolutely, on the death of her father and brother, still Mrs. Hoover, the mother, was entitled to a life estate. They cited and commented on *Butler vs. King*, 2 Yer. Rep. 115: *Roberts and Wife vs Jackson*, 4 Yer. Rep. 308: *Nichol vs. Dupree*, 7 Yer. Rep. 415: 7 Cranch. Rep. 464.

GREEN, J. delivered the opinion of the court.

The facts of this case are presented in the agreement of the parties, which is as follows, to wit, "It is agreed in this case, that Philip Hoover was the owner of the house and lot in the declaration mentioned and described at the time of his death, that he died in the year 1831, having made a will which was duly proven and recorded, and a copy of which is as follows, to wit: "I, Philip Hoover, of Nashville, in the county of Davidson, and State of Tennessee, do make and publish this my last will and testament, I give and bequeath to my daughter, Sarah Elizabeth Hoover and her heirs, my house and lot on Market Street, in the town of Nashville, being twenty-three feet nine inches front, and being the same that was conveyed to me by John Young, through his attorney in fact, Robert Woods. I order and direct that the rents and profits arising therefrom shall be appropriated for her support, maintenance, and education, but if such premises shall rent for more than will accomplish these purposes, whatever surplus there may be, I give and bequeath to my wife, Mrs. Sarah Ann Hoover, and my son, James Priestly, (only son) and after my said daughter marries, or comes of

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age, all the rents and profits of said house, and the house and tenement itself, to be her's exclusively. I also give and bequeath to my daughter, Sarah Elizabeth, above named, all my right and title to a negro girl, named Willey, and her increase, now in possession of Mrs. Wilson, of Nashville, and conveyed to me by Walter Willis by bill of sale, bearing date 8th January, 1829. It is my will, that after my debts are paid, all the rest and residue of my estate of every description shall be divided and apportioned equally between my said wife and my two children aforesaid. I appoint my friend, Addison East, of Nashville, executor of this will, and direct he shall not be compelled to give security for the trust hereby reposed in him. I do further will and devise, that if my said daughter should die before she is of age and without issue, her estate herein is to go to the survivor. In testimony whereof, I have hereunto set my hand and seal, this 8th day of March, in the year of our Lord, 1831.

“PHILIP HOOVER, [seal.]

“Published and declared in the presence of the undersigned, James Grizzard, Samuel McManus.”

It is also agreed, that James Priestly Hoover, the devisee and son of the testator in said will mentioned, died before his father, the said Philip Hoover; that Sarah Elizabeth Hoover, the daughter and devisee of the testator in said will mentioned, survived her father, and has since, but before the commencement of this action died under twenty-one, leaving no issue—she never having been married; that the mother of said Elizabeth and James P. Hoover, and the widow of the testator, is the defendant in this suit, and was in the possession of the premises mentioned in the declaration, at and before the commencement of this suit; that Philip Hoover, the testator, left two brothers, him surviving, to wit, Abel Hoover and Michael Hoover, both of whom have since died. The lessors of the plaintiff are their heirs at law, and also are the heirs at law of Sarah Elizabeth Hoover, unless the act of North Carolina or this state makes the mother the heir of the daughter either for life or otherwise. The question is, what interest, if any, the defendant, the widow of said Philip Hoover, takes in the premises, under the will of the

said Philip Hoover; or what right and interest she has in the premises by law as the mother of said Elizabeth Hoover.

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The circuit court gave judgment for the defendant, from which judgment the plaintiffs prosecute this appeal.

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In construing the will before us, the first question presented for the consideration of the court is, as to the meaning and application of the word survivor, as used in the last clause. The court, in endeavoring to arrive at a knowledge of the intention of the testator, must take into consideration the circumstances as they existed at the time the will was made. The testator necessarily used the language employed in his will, in reference to the state and condition of his family at the time he employed the expressions, and if we can be satisfied as to the meaning that was in his mind, when he used the language, we must give to his will the same meaning, how different soever the circumstances of his family may have become. To whom then does the word survivor refer? We answer, to the son of the testator, James Priestly Hoover. In the clause but one, before the one in which this word "survivor" occurs, he had devised the residue of his estate equally between his wife and two children aforesaid. Then he appoints his executor, and then comes the clause in which he devises the estate he had given to his daughter, in case of her death before she was of age, without issue, to the survivor. The children were united in his mind in the residuary clause, in which he speaks of them as his "two children aforesaid," and keeping them in his mind as his two children, and declaring that if one should die without issue, the estate should go to the survivor, he could only mean by the survivor, the other one of the two that thus occupied his attention. If the clause appointing the executor had not been introduced between these two clauses, it is not probable any doubt would have existed as to the meaning of the testator. But we think the introduction of this intermediate clause should make no difference in the construction. It contains no disposition of property—is merely the nomination of his executor, and was not calculated to draw off his mind from that which occupied it in the preceding clause. If this clause, appointing the executor, were omitted, and those two, in which the property

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is disposed of, restored to their natural order, it would read as follows: It is my will, that after the payment of my debts, all the rest and residue of my estate of every description, shall be divided and apportioned equally between my said wife and my two children aforesaid. I do further will and desire, that if my said daughter should die before she is of age, and without issue, her estate herein devised to go to the survivor. Considered in this connexion, it is most apparent that the testator, by the word survivor, intended his son only. That he meant by that word his wife, if she survived, has no plausible reason for its support.

But it is insisted in argument, that he meant both his wife and son, and that the word is to be construed as though it had been written in the plural, and for this Powell on Devises, 420, 421, 422, is cited. It is true, that the construction contended for, has been given to that word, very properly in some cases, but they were cases where the meaning could not be otherwise ascertained, and the bequest would be void for uncertainty. But there is no such reason in this case. If this word "survivor" be permitted to have its natural meaning, there is no difficulty in understanding it to refer to the other of the two children mentioned in the preceding clause. To suppose the testator intended his son and wife both, is not justified by the connexion in which they had been mentioned in the previous clause of the will, nor by the relation in which they stood to him. The son, should he survive his sister, would by law be the heir to her estate, and as we are not to suppose, unless the purpose be manifest, that a testator intends to disinherit his heir, so neither are we to suppose in this case, that the testator intended to give this property a different direction from that in which it would go by the law. But we are asked to violate this obvious principle, and to turn the singular number in which this word is used into the plural, to make it include this devisee, whose name had been used in no such connexion as to make it probable she was intended, and all this, when it has a natural, easy, and almost irresistible reference to the son only.

Upon the whole, we do not doubt but that the devise in question was to the testator's son, James Priestly Hoover.

Having this view of the case, and seeing that James Priestly Hoover died before his sister, the question which has been so ably and elaborately debated at the bar, whether this devise over, should Sarah Elizabeth die without issue, would be good as an executory devise, does not arise for the decision of the court. From the views heretofore taken of this will, it follows, that Sarah Elizabeth acquired the entire fee to the estate devised to her; and as her brother died before the death of the testator, she would have acquired precisely the same estate by descent, if he had made no will, that she took as devisee under the will. This being the case, it is well settled, that one who holds the same estate by devise, that the law casts on him by descent, is in by descent and not by devise. 6 Cruise's Dig. 135, § 1, 8, and 13. Regarding Sarah Elizabeth as holding this property by descent from her father, the only remaining question is, who is entitled to it, her mother or her paternal uncles.

This question is settled by the case of *Roberts vs. Jackson*, 4 Yer. Rep. 308, where it is decided, that the words "otherwise acquired," used in the the act of 1784, c 22, § 7, and 1784, c 10, § 3, do not mean lands descended from either parent. The estate of Sarah Elizabeth Hoover does not therefore vest in her mother for life, but descends to the lessor of the plaintiffs. The judgment of the circuit court must be reversed, and this court proceeding to give such judgment as that court should have given, order that judgment be entered for the plaintiffs in error.

Judgment reversed.

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THOMPSON vs. FRENCH.

Thompson

French

Actions of debt and *indebitatus assumpsit* are concurrent remedies in cases of simple contracts for the payment of money, either express or implied.

Debt lies to recover compensation for work and labor done, although there is no express contract as to the amount of compensation to be paid.

In all cases where the consideration has been executed, and where there is an express or implied promise to pay in money, the value thereof, *indebitatus assumpsit* or debt, is the proper remedy.

In all cases where the consideration is not executed, or if it be and the promise to be performed in consideration thereof, is not to pay money, but to do some other thing, neither *indebitatus assumpsit* nor debt will lie, but the remedy is by a special action on the case.

Wager of law has never been allowed or recognised in the courts of this State, and wherever it is not allowed, debt will lie against an executor upon a simple contract made by his testator. But if it were allowed, and debt were brought, the error can only be taken advantage of by demurrer.

To revive a debt barred by the act of limitations, there must be an express promise to pay, or an admission of an existing debt still due, which the debtor is willing to pay.

What will be sufficient to revive a debt barred by the act of limitations, is a mixed question of law and fact—the jury must find the facts, and the court must declare the law, arising upon said facts.

It is the legitimate province of the court to examine the proof adduced upon a plea of the statute of limitations, in order to see whether the finding is correct; and it is not bound by the verdict to the same extent, as when the question is one of unmixed fact, and when the conclusions thereon are to be drawn by the jury.

Where the testator frequently spoke of the services rendered to him by the defendant, and always declared a determination to remunerate him, and said in reference to those services, "that as yet he had made him but little remuneration, but that he would compensate him tenfold:" Held, that this was an admission of an existing liability, and a willingness to pay, which took the case out of the operation of the act of limitations.

It is not necessary in order to revive a debt barred by act of limitations, that the admission or promise should be for a specific sum *in numero*.

In debt, where the damages recovered are more than the amount laid in the declaration, it is not error.

Where the declaration, in debt, for services rendered, stated the debt to NASHVILLE, be due 1st January, 1836: Held that as time in such case was not material, ^{December, 1837.} interest could be recovered from the time the debt was due, although it was due anterior to the time laid in the declaration. Thompson
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A party cannot read as evidence for himself, his own answer to a bill of discovery; but where he proposed reading bill and answer, and the defendant said, "you may read the bill," and he then read both bill and answer: Held, that the verdict will not be set aside upon this ground, especially where the reading of the bill and answer, could not not have varied the result.

F. B. Fogg and J. Campbell, for plaintiff in error.

R. J. Meigs and Geo. S. Yerger, for defendant.

TURLEY, J. delivered the opinion of the court.

This is an action of debt brought by the defendant in error to recover compensation for services rendered the plaintiff's intestate in his life time, as a general superintendant of his property and business. The declaration contains the *indebitatus* count for work and labor done, and a count upon a *quantum meruit* for the same services. The pleas are *nil debit*, and the statute of limitations. The jury found a verdict for the defendant in error, upon which the court gave judgment, and to reverse which, this writ of error is prosecuted.

The proof shows abundantly, that Wm. P. French, the plaintiff in the circuit court, was assiduously engaged in attention to the business of Thomas Hopkins, the intestate, almost continually from the year 1821, to the year 1836, but without any special contract as to the amount or nature of the compensation to be given therefor, and out of this, the first cause of error is assigned, viz. that the action of debt is not the proper remedy, because 1st. the damages being unliquidated and uncertain, the proper remedy is *assumpsit* and not debt, and 2d. the action is not maintainable against an administrator upon the simple contract of his intestate by the principles of the common law.

That the actions of debt and *indebitatus assumpsit* are concurrent remedies in cases of simple contracts for the payment of money, either express or implied, has been so repeatedly held, that it is deemed unnecessary to enter into an examina-

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tion of the authorities in support of the proposition, and we are satisfied with a reference to the case of *Hickman vs. Searcy's Ex.*, 9 Yer. Rep. 47, where this point is expressly so adjudicated by this court.

That *indebitatus assumpsit* is a proper remedy to recover compensation for work and labor done, cannot be denied—indeed, (if the action of debt be not proper,) it is the only remedy, where the amount of compensation has not been ascertained by express agreement, for no special count in *assumpsit* can be framed upon a promise arising by implication of law. The special counts in *assumpsit* are given to recover damages for the non-performance of contracts specially entered into, and whether the consideration be executed or executory, makes no difference. The common counts are founded on express or implied promises to pay money in consideration of a precedent and existing debt, and in general, the consideration must have been executed, not executory, and the plaintiff must have been entitled to payment in money. 1 Chitty's Pl. 373. So that the *indebitatus* count in *assumpsit* is no more the proper remedy to recover unliquidated damages arising from the non-performance of a special contract, than would be the action of debt. But it is said that the action of debt will only lie for a sum which is certain, or is capable of being readily reduced to a certainty. This as a general principle is true, but extended to the length to which it is sought to be carried, would be entirely subversive of the action of debt as a remedy upon simple contracts, where the amount to be paid has not been ascertained by express agreement, or would make the right to use it depend not upon legal principles, but upon the nature and character of the proof to be adduced upon the trial, and the ease or difficulty which the value of services performed or the goods delivered, could be ascertained thereby. It is not denied that the action will lie for goods, wares and merchandise sold and delivered, and for work and labor done, although there be no express agreement as to the amount to be paid. This court cannot therefore say that the test is the difficulty of ascertaining the value of the goods sold and delivered, and the work and labor done, because

they may be of a kind and character about which men may well differ in opinion.

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It is not to be denied, that there is some confusion produced in the books relative to the use of this action, by the employment of such terms as "*co nomine*," "*in numero*," and "unliquidated damages." But it is well settled, that although a specific sum must be demanded in the declaration, a less may be recovered, and that although in all cases of goods, wares and merchandise, sold and delivered, and of work and labor done, where the law implies the promise, because the consideration is executed, the damages are of necessity unliquidated, yet the action is maintainable. But this confusion is produced either by a loose use of the phrases, or by giving them an improper construction. By "*co nomine*," and "*in numero*," is only meant, that a specific sum is sought to be recovered which is improperly detained, and that the action does not sound in damages as does the action of *assumpsit*, thus drawing the proper line of demarcation between them, as applicable to contracts of the character under consideration. By the words, "unliquidated damages," is manifestly meant (if there be any meaning in what is most unquestionably a very loose use of words,) such damages as are sustained by the non-performance of an executory contract, which cannot be considered as a money demand, and the amount of which may depend upon such a variety of considerations and circumstances, as to render it exceedingly difficult to be ascertained. To illustrate it by an example, suppose a contract for the building of a house, which is not performed, or performed in a manner different from the contract, the damages sustained are "unliquidated," and such as are not readily reduced to a certainty, and for which neither *indebitatus assumpsit* nor debt will lie.

The principle then established by us is this, "that in all cases where the consideration has been executed and where there is an express or implied promise to pay in money the value thereof, *indebitatus assumpsit* or debt is the proper remedy. But that in all those cases, where the consideration is not executed, or if it be, and the promise to be performed in consideration thereof, is not to pay money, but to do some other

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thing, that neither *indebitatus assumpsit* or debt will lie, and that the remedy is by a special action on the case.

By the common law, that an action of debt on a simple contract, could not be maintained against executors or administrators is true, for the reason that they could not wage their law as their intestate or testator might if living. But whether this principle is applicable here, may be more than questioned, inasmuch as the wager of law has never been allowed by our courts of justice, in any case whatever. Vide *Childress vs. Emory*, 8 Wheat. Rep. 642. But if this were otherwise, an administrator or executor can only take advantage of such a mistake by demurrer, and cannot object to it after pleading to the merits of the case. 1 Chitty's Pl. 128.

The second cause of error assigned, arises out of the operation of the statute of limitations, which it is contended barred a recovery of compensation for any services rendered more than six years before the commencement of the action. It is admitted the law upon this point was correctly expounded by the court below, and therefore the only question for our consideration, arises out of the proof adduced, in order to take the case without the operation of the statute.

From the time of the passage of the statute of James I, down to the present, the decisions of the different courts in England and the United States, upon the operation of the statutes of limitation as to personal actions, have been of so conflicting a character, that any attempt to examine them with the view to extract a principle from them would be tedious and hopeless. We shall therefore rest contented with abiding by the decision of this court upon the point involved in controversy, made in the case of *Belotte's Ex. vs. Wynn and others*, 7 Yer. Rep. 534. The court there say, "that to revive a debt barred by the statute of limitations there must be an express promise to pay or an admission of an existing debt still due, which the debtor is willing to pay." If upon this principle there be not proof in the case under consideration, of such a character as will prevent the statute of limitations from operating as a bar to any part of the plaintiff's demand, the judgment is erroneous and ought to be reversed. What will be sufficient to revive a debt barred by the statute of lim-

itations is a mixed question of law and fact, in other words, the jury must find the facts and the court must declare the result, therefore it is the legitimate province of the court to examine the proof adduced, in order to see whether the finding of the jury be correct, and it is not bound by the verdict to the same extent as when the question is of unmixed fact, and when the conclusions are to be drawn by the jury.

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The question then presented to this court is, not the usual one of whether there was any proof from which the jury might have inferred the facts submitted to their consideration, but whether if the proof adduced be true, it be of such a character as will warrant the court in saying, that there is such a promise to pay, or such an admission of the existence of the debt, barred as will revive it, and take it without the operation of the statute of limitations.

There is much proof in this case from the letters of the intestate, and other sources, showing the nature of the services rendered by the plaintiff, and the repeated assurances that he should be well remunerated therefor. But it is the testimony of John Petty which is mainly relied upon for preventing the operation of the statute of limitations. He says, that he had heard Mr. Hopkins, the intestate, frequently speak of Mr. French, the plaintiff, and the services he had rendered him, and declare a determination to remunerate him; the last time was in 1835, when he said that he had as yet made him but little remuneration, but that he would compensate him tenfold. This we think is not only an admission of the existence of his liability to French, but both a willingness and direct promise to pay it. To say that the admission and promise must be for a specific sum *in numero*, would be to go further on the subject of the statute of limitations than our courts have yet gone, and further than we can see any necessity for going. We think the statutes of limitations were designed to prevent persons from being harassed by, and being made liable for stale demands; and unless we could say, as has been done by statute in England, that no debt barred by the statute of limitations shall be revived unless it be done in writing, we do not see how greater security can be given than is by the principle, which requires either a direct admission of the existence

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of which amount to the same thing in substance, the only difference being, that in the one instance there is a promise to pay, which of itself recognises the existence of the demand, and in the other there is an implied promise to pay, arising out of the admission of the existence of the demand.

The third cause of error assigned is, that the amount of damages demanded in the declaration for the detention of the debt is not sufficiently large to cover the amount assessed by the jury. That this is not error, has been determined by the supreme court of this State in the case of *Stewart vs. Davidson*, Peck's Rep. 203.

Upon a point of practice, we would not unsettle an adjudicated case of our own court, even though we might think if it were a new question, we would have settled it otherwise, but we do not so think, and the case is supported by that of the *Executors of Vanransalier vs. Executors of Platner*, 2 John. Ca. 18.

The fourth cause of error assigned is, that the debt demanded is stated in the declaration to have been due on 1st. January, 1836, and that interest should only have been allowed on the demand from that time.

This proposition we do not assent to.

Time is important in the description of written contracts, and if misstated, it is a fatal variance; but it is not so as to a verbal or implied contract. The allegation of the debts being due at one period, is sufficiently supported by proof of its being due at a time anterior, and we therefore think that the jury were warranted by law in calculating interest on the different items of the debt, from the periods at which they separately fell due.

The fifth cause of error assigned is, that an answer of the plaintiff to a bill of discovery, filed in the case by the defendant was permitted to be read, although objected to by the defendant. It is true, as we think, that the answer was not legal evidence, and if nothing else had transpired but the reading of it after it was objected to, it would have been error; but it appears from the bill of exceptions, that when the record of the bill and answer were offered in evidence, the

defendant observed that you may read the bill, which the plaintiff did, but was stopped, when in continuation he proposed to read the answer.

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That the plaintiff thought that the consent extended to both bill and answer, seems obvious to us, for why should he wish to read the bill which contained serious charges against him, unless he could also read the answer, which explained them. The circuit court must also have thought so, and having a much better opportunity of knowing whether there had been an attempt to entrap than we have, we will not undo what it has done, and the more especially as we do not see that the reading of the bill and answer could have produced much change in the result.

The sixth and last cause of error assigned is, that the debt and damages are excessive. This was a question peculiarly within the province of the jury, and the court would not reverse for a mistake as to the amount, unless it were gross and palpable, which we think is not the case. The services rendered were of a laborious and important character, and continued for a series of some sixteen years, and without other remuneration than such as may be obtained by this judgment.

Upon the whole, we think there is no error in the rendition of the judgment in the court below, and direct its affirmance.

Judgment affirmed.

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Sims

▼
Cross

SIMS' lessee vs. CROSS & MARBERRY.

When the report of the clerk and master, upon which a decree is made, does not identify the land sold, but refers to the mortgage deed, which is a part of the record, as containing the description, it is sufficiently certain.

Where mortgaged land is sold under a decree foreclosing the mortgage, the sale is not void by the provisions of the champerty act of 1821, c 66, although there was an adverse possession when the bill was filed, and at the time when the decree and sale was made.

Judicial sales, or sales made by virtue of a judgment or decree, are not champertous, although there is an adverse possession at the time of the decree and sale.

The champerty act of 1821, does not apply to conveyances made in fulfilment of *bona fide* contracts, made and entered into before there was an adverse possession.

W. E. Anderson, for plaintiff in error.

J. Campbell, for defendant in error.

TURLEY, J. delivered the opinion of the court.

This was an action of ejectment, in which the right of the plaintiff to recover depends upon the validity of a decree of a court of chancery foreclosing a mortgage under which he purchased, and which therefore forms a link in his title. To this decree two objections are taken, first, that it is void for uncertainty; and secondly, that it is void because at the time the bill was filed, and the decree rendered, the land was held adversely, and therefore a sale under it conveys no title, being made contrary to the provisions of the champerty act of 1821, c 66.

1st. Is the decree void for uncertainty? It is argued that it is, because the land is not sufficiently described. The clerk and master reports, that in pursuance of the interlocutory decree he had exposed to sale the property mentioned in the mortgage deed, that the one hundred and fifty acres of land lying in Bedford county, on the north side of Duck river, was struck off to Wm. P. Sims, for five dollars. The report does not identify the land, but refers therefor to the

mortgage deed, which is a part of the records of the suit, and which does describe the land with certainty. This is sufficient, because though the report be of itself not sufficiently certain in its description of the premises, yet it may be made so by an inspection of the deed of mortgage referred to.

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2d. Is the sale under the decree void by the provisions of the act of 1821, c 66, because the land was held adversely at and before the time it was made. The act provides, that "no person shall agree to buy or to bargain, or to sell any pretended right or title in lands, tenements, or any interest therein, and if any such agreement, bargain, sale, promise, covenant or grant be made, when the seller has not himself, or by his agent, or tenant, or his ancestors, been in actual possession of the same, or of the reversion or remainder, or taken the rents or profits for one whole year next before the sale, such sale, bargain, promise, covenant, grant or agreement, shall be utterly void, and if any suit in law or equity shall be brought for the recovery of the lands or tenements, as bargained or contracted for, whether the agreement, sale, bargain, grant or promise be executed or executory, the court in which such suit may be depending, upon the facts being disclosed in the manner therein pointed out, shall forthwith dismiss such suit with costs. Provided that sales by execution be not prevented or impaired, but continue as heretofore."

That this statute avoids all contracts for the sale of lands, tenements, or hereditaments, made between individuals, which at the time of the contract were adversely held, is not disputed. But it is said that it is not applicable to the present case, because, 1st. It was not intended to apply to sales made under a decree or by the judgment of the court, because they are not liable to the abuse which was intended to be prevented. 2d. That this case falls within the spirit, if not the words of the proviso in favor of execution sales. and 3d. That the act does not apply to conveyances made in fulfilment of honest contracts entered into, where the adverse possession has accrued since the date of the contract.

1st. Does the statute apply to a sale made by virtue of the decree of a court? The reason assigned by Lord Coke, why

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a right of entry was not assignable at common law is, "that under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." Coke Lit. 214, a. The repeated statutes which were passed in England against champerty and maintenance arose from the embarrassments which attended the administration of justice in those turbulent times, from the dangerous influence and oppression of men in power. 4 Kent's Com. 439. That these evils could only exist in cases of individual sales, is to our minds so self evident, that it appears difficult to make it plainer by illustration. At the time the statutes were passed, the titles to lands were not changed by executions or judgments of a court of law, and the idea of an equitable interest, to which the court of chancery by a decree might add the legal title, we apprehend had never been conceived of by a lawyer of England. Sales made by the judgment or decree of the court, then, could not have been intended to be embraced. And it is the after change of the powers and practice of the courts which has induced the argument, that the statutes of champerty must be made to apply to sales of real estate, made under their supervision and control. The evils to be apprehended are not of sufficient importance to induce us to make such an application of these statutes. We can scarcely conceive of the possibility of a sale of lands being effectuated under the judgment or decree of a court, with a view of fraudulently escaping the operation of the statutes of champerty, in order to enable a powerful man to oppress his enemy or poor neighbour. It is vain to say that our statutes of 1821 was passed long after the time when the power had been given by legislative enactment, and assumed by which the titles to real estate, in a great variety of instances, were changed by the judgments and decrees of the courts, and that inasmuch as execution sales are excepted therefrom, that therefore the decrees of a court divesting title are not embraced; because we know the pertinacity with which the forms of English statutes have been adhered to in the United States, whenever they have been re-enacted; and the case of *Parks lessee vs. Larkin*, reported in 1 Tennessee, 101, explains why, out of an

abundance of caution, execution sales are provided for in the statutes. NASHVILLE,
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In this case it was decided by the superior court, consisting of judges Overton and Whyte, that execution sales were not embraced by the statutes against champerty; and it is almost a part of the legal history of the country, that one of the attorneys who in that case contended that such was the correct decision, drew the champerty act of 1821. It is obvious, that the fact, that the principle had been questioned was sufficient to have produced the proviso.

Entertaining the view of this proposition which we do upon principle, yet we are gratified to find that we are not without authorities expressly adjudicated by highly respectable tribunals on the point. In most states of the union the statutes against champerty have been re-enacted in substance as they were originally passed, and therefore the decisions of other states may be safely resorted to as a guide in expounding our own. In the case of *Tuttle vs. Jackson*, 6 Wend. Rep. 213, the question arose, and the chancellor who delivered the opinion, which was concurred in by fifteen senators to five, says at page 224, "I am satisfied the statute against buying and selling pretended titles cannot apply to judicial sales. The statutes, except as to the penalty, is merely an affirmation of the common law, and that never has been considered as preventing the change of property by operation of law or by a sale by the proper officer under a *bona fide* judgment, or a decree of a court, having a competent jurisdiction to order such sale. It does not come within the mischiefs intended to be guarded against by the statutes."

In the case of *Saunders' heirs vs. Groves*, 2 J. J. Marsh. Rep. 407, the court of appeals of the State of Kentucky says, "that a deed made under a decree of a competent court cannot be within the reason of the act against champerty, although another be in adverse possession."

It will be remembered that in Kentucky, courts of chancery operate in *personam* and not in *rem*, and that therefore where our courts of chancery vest title by decree, theirs compel a conveyance by deed, and the authority is directly in point.

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We have seen that in the case of *Parks' lessee vs. Larkin*, 1 Tennessee Rep. 101, it was held by the superior court of the state, filled by two able jurists, that an execution sale was not void by the statute against champerty, and this was before there was any exception made in their favor, and therefore could only have been upon the ground, that they were not within the evils intended to be provided for. The same principle must of necessity apply to sales made in pursuance of the decree of the court of chancery. For these reasons and upon these authorities we cannot hesitate, especially when there is not a precedent to be found to the contrary, in saying that our act of 1821, c 66, does not vitiate a sale made under the decree of a court of chancery, although there is an adverse holding at the time of filing the bill and making the decrec.

But if this were not so, we have no hesitation in saying upon the second point, that a decree for the foreclosure of a mortgage is within the spirit of the proviso in favor of execution sales. A court of chancery always considers mortgaged property as a security only for the payment of a debt, and by virtue of its acknowledged powers decrees a sale for the payment thereof, without compelling the mortgagee to resort to common law courts for redress. It is then in substance nothing but selling property by operation of the law for the payment of debts, and what difference can it possibly make whether this be done by virtue of a *fieri facias* directed to the sheriff, or by the clerk and master under the decree of the chancellor?

This makes it unnecessary to determine the third point, but if it were, we are not without authority for saying, that that is also for the plaintiff in error. In the case of *Jackson vs. Ketchum*, 8 John. Rep. 479, "It is held that the purchase of land during the pendency of a suit concerning it, if made with a knowledge of the suit, and not in consummation of a previous bargain is champerty," ergo, it is not so if purchased in consummation of a previous bargain. In the case of *Saunders' heirs vs. Groves*, before referred to, 2 J. J. Marsh. Rep. 417, it is said, "That the act does not apply to conveyances made in fulfilment of honest contracts entered

toni before the adverse possession." In the case of *White-*
sides vs. Martin, 7 Yer. Rep. 398, the Supreme Court of
 the State of Tennessee, says, "That in the construction of
 the British acts of champerty, the settled doctrine is, that a
 contract to convey vests the equity in the bargainer, who has
 the right, not only to call for the legal title in fulfilment of
 the bargainer's covenant, but the latter holding as trustee,
 cannot refuse his name to the purchaser to recover the prem-
 ises if need be." There are cases where the equity attached
 previous to the adverse holding, and where a decree for the
 legal title is sought, much stronger than the case of a mort-
 gage, in which the legal title has been passed, and nothing is
 sought but to foreclose the equity of redemption.

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 v
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There is then in our opinion manifest error in the judg-
 of the court below, which is therefore reversed, and the
 cause remanded for a new trial.

Judgment reversed.

HIBBITS vs. CANADA, et. al.

Where an administration bond is made payable to A B, chairman of the
 county court and his successors in office, instead of the governor, &c. as
 directed by law: Held, that no suit could be maintained on the bond by a
 successor to A B.

But in such case the bond is valid at common law, as a voluntary bond,
 and a suit may be maintained in the name of the personal representatives
 of A B, (he being dead) for the use of the distributees, &c.

This suit was brought upon an administrator's bond against
 the defendants as sureties. The bond was given in 1812,
 and is payable to "James Hibbits, chairman of Smith coun-
 ty, and his successors in office." The suit is brought in the
 name of D. Canada and R. Hibbits, administrators of James
 Hibbits, deceased. The defendants demurred to the decla-
 ration, assigning for cause of demurrer, 1st. that there was
 a variance between the declaration and the bond, in this, that
 the bond was payable to James Hibbits, chairman, &c., and

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the declaration stated it to be made payable to James Hibbits, and that it was sued upon by the representatives of James Hibbits, and not his successors in office? That the bond was made payable to James Hibbits, chairman, &c., when it should have been made payable to the governor, &c., and for this it was void. The circuit court sustained the demurrer.

J. S. Yerger, for plaintiff in error. 1. It is true, that the act of assembly at the time this bond was executed, required the bonds of administrators to be made payable to the governor, &c. 1 Scott Rev. 30, 31, § 5: and a suit cannot be sustained on it in the name of successors. 3 Calls Rep. 364, 454.

2. Although this is not a good statutory bond, yet being made by persons competent to contract, and upon a subject matter not prohibited by law, or *malum in se*, it is good as a voluntary common law bond. 2 Yer. Rep. 113, 114: 4 Dev. 268: 2 J. J. Marsh. Rep. 473: 2 Dev. Rep. 12: 3 Do. 86, 284, 296, 297: 2 Hawk. 5, 366: 3 Do. 42: 2 Call Rep. 454: 1 Pir. Dig. 111, pl. 23, 24: Hurlston on Bonds, 63, 78, in 9 Law Lib.: 4 Dev. 584.

3. The bond is well described, as payable to James Hibbits, the words, "chairman, &c." are merely *descriptio personæ*, and not necessary to the validity of the bond. It may be considered *suplusage*. 3 Dev. 86, 284, 296, 297: 2 Do. 6: 1 Do. 315: 4 Do. 268: 3 Hawk. 42: 2 Car. La. Rep. 460.

4. If the bond be not good as a statutory bond, no suit could be brought on it in the name of James Hibbit's successors, but in the name of his personal representatives only.

It is only by virtue of the statute that a successor can sue. By the common law the obligee or his personal representative alone could sue. 3 Call's Rep. 421: 3 M'Cord's Rep. 447: 4 Dev. 268: Toller on Ev. 201: 2 Bl. Co. 430, 431: 1 Wms. on Ex. 545: Hurlston on Bonds, 5, in 9 Law Lib.

No person appeared for the defendants in error.

REESE J. delivered the opinion of the court.

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This is an action brought upon a bond, given in 1812, by an administrator and his sureties, conditioned for the faithful performance of the duties of that office. The bond was made payable to James Hibbits, chairman, &c. and to his successors, &c. when by the provisions of the law at that time existing, it should have been made payable to the governor, &c. The plaintiffs are the personal representatives of James Hibbits, and in that character brought suit for the use of those interested in the estate, upon which administration was granted. A demurrer in the circuit court was filed to the declaration upon the ground, 1st. That the bond was made payable to James Hibbits, chairman, &c. and to his successors, and the action was brought, not by his successor for the use &c. but by his personal representative for the use, &c.; and 2d. Because the statute having directed an administration bond to be made payable to the governor for the time being and to his successors, and the bond in question having been made payable to the chairman, &c, and to his successors, the bond was not a good statutory bond, and no action whatever can be maintained upon it. The demurrer was sustained by the circuit court, and the plaintiffs have brought the cause to this court.

1. Should the action have been brought in the name of the personal representative of Hibbits', or in the name of his successor as chairman? To have maintained the action in the name of Hibbits' successor, the bond must have been good under the statute; for a successor cannot sue in that character on any ground, other than the express provisions of the statute. See the case of *Swart and others vs. Lee, Governor, &c.*, 3 Call's Rep. 364, 2d ed. And as this was not a good statutory bond, having been taken to the chairman, when it should have been taken payable to the governor, the action could not have been maintained in the name of the successor of Hibbits as chairman.

2d. As the bond in question was bad, as a statutory bond, can an action in the name of Hibbits' personal representative

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be maintained upon it as a good voluntary bond? And we entertain no doubt that it can, both upon reason and authority.

If there had been no statute requiring a bond from an administrator, and he had chosen for the indemnity of creditors and distributees, to have entered into an obligation with sureties, for the faithful marshalling of the assets, the transaction would have violated no rule of public policy or private morality, but on the contrary, would have been in all respects highly proper, and he and his sureties would certainly have been bound thereby. When, however, the statute requires a bond, and directs that it be made payable to some public functionary, a governor, a chairman, or other officer, for the benefit of those interested, and this direction be not correctly pursued, but a wrong officer be named, upon what ground is it that such non-compliance, as to matter of form on the part of the obligors, shall make the substance of their obligation void in favor of those interested in the estate, and who had no agency even in producing the mistake. The principle of their liability in such case, so consonant to reason, is amply sustained by authority. See 2 Yer. Rep. 113, 114, and the authorities there cited: see also 7 Mass. Rep. 98: 5 Mass. Rep. 314: 7 Yer. Rep. 91: 1 Pir. Dig. 111, pl. 23, 24: 4 Dev. Rep. 584: Hurlston on Bonds, 63, 78, in 9 Law Lib.

We are of opinion, therefore, that the demurrer should have been overruled. Let the judgment be reversed and the case remanded to the circuit court for further proceedings to be had therein.

Judgment reversed.

NASHVILLE,
December, 1837.PEAK *vs.* LIGON, *Admr.*Peak
v
Ligon

A decree which does not in terms divest the title of the defendant, but merely directs him to execute a deed with certain limitations prescribed in the decree, does not, until the execution of the deed, divest the legal title out of the defendant.

Where a decree, putting a construction upon an antinuptial contract, was rendered by the supreme court of North Carolina, in a suit between A and B, it is conclusive in a suit between the same parties or their privies in this State.

This was an action of detinue for several slaves. The facts were as follows:

John Davis, the intestate, on the 15th of August, 1812, being about to intermarry with Sarah Peak, executed jointly, with his intended wife, a paper writing, by which they promised and agreed to give Elijah W. Kimbrough, a son of said Sarah, a "negro girl, named Luce, and her increase, and one horse and one feather bed and furniture, when he arrived at the age of 21 years, and then if he should die without issue, all the above mentioned property to return to them and their children again."

Kimbrough came of age on the 8th of May, 1814; but Davis neglected to convey the negro, and in September, 1819, Kimbrough filed his bill in the court of Equity for Wake county, North Carolina, against Davis and his mother, to compel them to execute this agreement specifically. In September, 1826, the cause was removed into the supreme court, where it was heard at December term, 1827.

The court decreed that Davis should "deliver the negroes to Kimbrough, and that he should convey them by a deed sufficient to pass the absolute property, provided Kimbrough should die leaving issue, and in the event of his dying without issue, they, together with their increase, should revert to Davis, his heirs, executors or administrators."

Kimbrough sent R. H. Simmons, his agent, to receive the negroes, and they were delivered to him on the 11th of July, 1828, he executing a receipt as follows: "Received of John Davis five negroes, to wit: (naming them,) which negroes Elijah Kimbrough recovered of the said John Davis, in

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said John Davis, and his heirs, in case the said Elijah Kimbrough should die without leaving any lawful issue."

On Simmons' return to Tennessee, he met Kimbrough on his way to North Carolina, Kimbrough told him to bring them to Tennessee and deliver them to Peak, which was done. Kimbrough pursued his journey to North Carolina, where, in August, 1829, he killed Davis, and was hung for the murder on the 5th of November, 1830. Never having been married, he died without issue.

On the 9th of September, 1829, Peak sued out an attachment against Kimbrough, which was levied upon seven negroes, Luce and her increase, as Kimbrough's property. The negroes were sold to satisfy Peake's demand on the 9th January, 1830, and Peak became the purchaser of all except those who were sold to satisfy Helm's execution.

Ligon, administrator of Davis, having demanded the negroes of Peak, commenced this action of detinue upon the 4th of November, 1833. The demand was made a few days before the commencement of the suit.

Peak pleaded, 1st. *Non detinet*. 2d. That the cause of action did not accrue within three years. 3d. That Ligon was never administrator, upon all which pleas issues were taken, which were found for the plaintiff on the 30th of August, 1837. The defendant moved for a new trial, which being refused, the court gave Ligon judgment in conformity with the verdict, from which judgment the defendant prosecutes this appeal in nature of a writ of error.

F. B. Fogg and Geo. S. Yerger, for plaintiff in error.

R. J. Meigs, for defendant.

REESE, J. delivered the opinion of the court.

A suit in chancery was brought in the courts of North Carolina, by one Elijah Kimbrough, the son of the wife of the intestate Davis, against Davis and his wife, to enforce an antinuptial agreement between the husband and wife, made in favor of Kimbrough, and in consideration of the intended mar-

riage, in which it was stipulated that on the said Kimbrough's becoming twenty-one years of age, he should have a certain negro woman slave, named Lucy, at that time the property of Kimbrough's mother, and certain other articles, and that if the said Kimbrough should die without issue, all the property should return to the said Davis, and his said intended wife, and their children again. In the supreme court of North Carolina a decree was given in said suit in favor of the said Kimbrough against Davis and his wife, in which it was "ordered that Davis, the defendant in that suit, should deliver the aforesaid negroes" (being the said Lucy and her then increase) "to the complainant, the said Kimbrough, and that he should convey them by a deed sufficient to pass the absolute property, provided, the said complainant should die leaving issue, and in the event of his dying without issue, that they, together with their increase, should revert to the defendant Davis, his heirs, executors or administrators, and that he should execute the same in presence of the clerk, or the deputy of the clerk, within twenty days after being served with a copy of the decree." No deed, pursuant to this decree, or otherwise, was made by Davis to Kimbrough for the negroes in question, but upon the application of Kimbrough's agent to Davis for the negroes, Davis delivered them to him, and the agent, by the advice of Kimbrough's counsel in the suit, gave the following receipt: "Received of John Davis, the within contents, say five negroes, to wit, Lucy, Dilcy, Arthur, Sampson and Stanford, which negroes Elijah Kimbrough recovered of the said John Davis in the supreme court of North Carolina, subject to be returned to the said John Davis, and his heirs, in case the said Elijah Kimbrough should die without leaving any lawful issue." The negroes were thereupon brought to Tennessee.

In 1829 Davis departed this life, intestate, and in 1830 Kimbrough also departed this life, without ever having been married. The administrator of Davis brought this action of detinue to recover the negroes from defendant, in whose possession they were, under a sale founded upon certain attachment proceedings against Kimbrough by the defendant as his creditor. And now, the question is, whether this action can

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NASHVILLE, be maintained by the personal representative of Davis; and
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the argument upon the point has been such as to remove from our minds all doubt or difficulty. The task is not ours to fix a construction upon the anti-nuptial contract, and to determine the rights of the parties with regard to it. That has been done; it is *res adjudicata*, and the parties before the court are concluded by it. Nor is it incumbent on us to enquire how, by the interposition of trustees or otherwise, a conveyance should have been framed so as to have given the legal effect to the limitations indicated in the decree, and to have made the intentions of the court and the rules of law and property co-operate and harmonize. No conveyance whatever having been made, the matter was left in the best possible situation, in view of the events which have happened, to give effect to the rights of the parties as declared in the decree of the supreme court of North Carolina.

From the time of the anti-nuptial contract to the time of the decree, the legal title to the negroes in controversy, by operation of the marriage, was in Davis, and after the decree, no conveyance as therein ordered, having been made, the legal title continued in Davis, as trustee for those interested under the decree. For, in the first place, the legal title was not by the terms, or by the operation of the decree, divested out of Davis and vested in Kimbrough; to attain such an object the decree itself directs that an actual conveyance shall be made: And, in the second place, the delivery alone of the negroes by Davis to Kimbrough, or to his agent, would not in the State of North Carolina, especially since their act of 1806, have the effect to clothe Kimbrough with the legal title; besides, when the delivery was made, it was made expressly upon the terms that the property should be held subject to the rights asserted in the decree, and a written acknowledgment of this in part was given to Davis, at the time, by the agent of Kimbrough.

We have no doubt that the legal title to the property is now in the personal representative of the intestate, Davis, for the benefit of his widow and children; that all interest in the property, on the part of Kimbrough, terminated with his life; and that, therefore, the plaintiff can well maintain this action

against the defendant, and was entitled to the judgment which he obtained in the circuit court, which, therefore, we affirm.

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Judgment affirmed.

Neely
v
Lyon

NEELY vs. LYON.

Where property belonging to A is in the adverse possession of B, and A forcibly takes the property into his possession: Held, that although A might be guilty of a trespass in so doing, yet in an action of detinue brought against him by B, B could not recover back the possession.

C. Ready, for plaintiff in error.

Geo. S. Yerger, for defendant.

REESE, J. delivered the opinion of the court.

This is an action of detinue, and was brought by Neely, the plaintiff, to recover six negro slaves. The defendant pleaded the general issue, that she did not detain the slaves in question. On the trial, it appeared in proof that the negroes had been in the possession of the plaintiff; but how he had obtained the possession of them from the defendant, whether by hiring them, or on an indefinite loan, or in what way, does not appear from the record. The defendant, who is an unmarried woman, and the aunt of the plaintiff, in going with a wagon to the house of the plaintiff for the purpose of taking away the negroes, met the plaintiff on her way, and told him of the object of her visit. Plaintiff said that one of the negroes was so necessary to him that he could not part with him, and that he would send some of the balance; but in this interview he set up no title to property in the negroes, nor did he allege any right to the possession. Defendant insisted that she must take away the negroes, but on plaintiff's stating that it was ten miles to his house, and that she could not reach there before night, she seemed to abandon her purpose, and he went on his way. Defendant, however, went on to the house of plaintiff, stayed all night, and in the morning, plaintiff being away, took with her the negroes. It did

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not appear that the plaintiff had been three years in possession of the negroes, or that his possession had, at any time, been adverse to the claim of the defendant. Upon the trial, however, he set up a deed of gift for the negroes from the defendant to himself, which had been proved in court and registered; but which defendant proved by several witnesses to be a forgery, and the jury so found. No question is raised upon the record with regard to this supposed deed of gift. But it seems to have been urged before the jury upon the trial, that whatever might be the titles of the defendant to the property and to the possession of the negroes, and however without right the plaintiff may have been to either the property, or the possession of the negroes, still, if the defendant below obtained their possession by trespass or tortuously, the plaintiff was entitled to recover them from her. The judge charged the jury "that if the plaintiff had possession of the negroes, claiming them adversely to the defendant, or forbid the defendant taking them out of his possession, and she notwithstanding took them, she had committed a trespass upon the plaintiff's possession, and would be liable for such trespass; but if the negroes were hers and she had not conveyed them to the plaintiff, and he had not acquired a title by three years adverse possession, such taking by her, although a trespass, would not amount to a forfeiture of her title. This suit is not brought for such a trespass. The declaration is in detinue. She pleads she does not detain the negroes of the plaintiff; and whether the negroes are the property of plaintiff or defendant, is the question to be decided in this suit. Should it be held she could not set up her title, because she got them into her possession illegally, the consequence would be the plaintiff would recover the negroes, or their value, and after he got them into his possession by this recovery, if she should then sue him to recover them back, she might be estopped by this recovery. That the record of this judgment might be read to show she had no title;" and he adds, "it is unnecessary in this case to consider whether she was guilty of a trespass in taking the negroes or not."

We readily and fully assent to the entire correctness of this charge. But it is alleged to be erroneous, because it is said

to recognise the right of recaption, which has been frequently and strongly repudiated by this court. We do not understand the charge of the circuit court to recognise such right, on the contrary, the jury were told that the true owner of property would be liable as a trespasser for taking her own property illegally from the possession of the plaintiff. But he did, in substance, tell the jury that in an action of detinue the plaintiff must have a general or special right to the property, or to the possession of the thing sued for, and that if he had no right to the property, or to the possession of the thing sued for, he could not recover it in detinue against the true owner, upon the mere ground that such owner had committed a trespass in obtaining the possession from him. We assent cordially to the principles determined in the cases of *Kegler vs. Miles*, Martin and Yerger's Rep. 426: *Partee vs. Budget*, 4 Yer. Rep. 174: and *Marshall vs. Pennington*, 8 Yerger's Rep. 424. It is true in the first named case, the judge who delivered the opinion of the court remarks, *obiter*, "that the better opinion is that when the right exists unbarred, and the true owner by violence, or by a tortuous and unlawful act obtains possession of the slave, he shall not be permitted to set up his better title, when sued by him, who was tortuously deprived of the possession. To do so, would be to permit the defendant to take advantage of his own wrong." This remark is not necessary to the determination of any question involved in the case, and it is therefore but the *dictum* of the judge who delivered the opinion. But the remark itself is correct in most of its bearings, and probably in the sense in which the judge used it. If the party were proceeded against for such violence, or for such tortuous or unlawful act, it would be wrong that he should protect himself upon the plea of ownership; and such was the very point determined in the case of *The State vs. Thompson*, 2 Tenn. Reports, and the case of *Marshall vs. Pennington*, 8 Yerger's Reports, 424. But if the *dictum* imports that where the suit is detinue, and the title to the property itself, is the matter in contest, the party having no title by the statute of limitations or otherwise, shall yet recover against the true owner the property itself, because of his tortuous or illegal act in obtaining the posses-

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sion, then we distinctly dissent from the correctness of the position. We do not understand this, however, as having been asserted. Let the judgment be affirmed.

Judgment affirmed.

WATSON vs. SMITH's lessee.

Where a tenant, after the expiration of his term, but whilst in possession, disclaims his landlord's title and holds adversely for seven years afterwards: Held, that the act of limitations would not protect him, unless his disclaimer was known to the landlord, and possession was held adversely seven years afterwards.

W. E. Anderson, for plaintiff in error.

C. Ready, for defendant.

GREEN, J. delivered the opinion of the court.

James Smith made a verbal lease of the land in dispute to Watson in the year 1824, for one year. He afterwards removed to Alabama, where he resided till 1825, when he returned to this State, and settled within a few miles of the land in dispute. After the expiration of the year for which the lease from Smith was made, Watson continued in possession of the land, but agreed to hold under the title of Leonard P. Cheatham, who claimed it. Smith has a grant for the land, but the title under which Cheatham claims is older and better than Smith's. Watson continued in possession more than seven years, after the expiration of his lease from Smith, and after he disclaimed to hold under Smith and took protection under Cheatham. But there is no evidence that Smith or his heirs knew at any time that Watson was holding under Cheatham and not under Smith. It is settled by this court in the case of *Duke's lessee vs. Harper*, 6 Yerger's Reports, that a tenant cannot resist his landlord's title, although he may hold adversely to it under another title, unless his disclaimer is known to the landlord and the adverse possession continue seven years after such knowledge.

The principle as settled in that case is not controverted; but this case, it is thought, is distinguishable from that. In that case, the disclaimer first occurred during the term for which the tenant had leased; but here it was made after the expiration of the lease, the tenant having held over after the expiration of the term for which he had contracted. We think this slight circumstantial difference creates none in principle between the cases. Watson continued to be tenant after the expiration of the term agreed on for the lease, and if tenant, he is under the same disabilities on this subject as though he had been such by express contract. Smith had a right to suppose he was holding for him and under him, unless he had notice that the fact was not so; and unless he had such notice, the possession of Watson can operate nothing against his title. Affirm the judgment.

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Judgment affirmed.

M'KINLY vs. HOLLIDAY.

A bona fide possessor of land, from whom the same had been recovered, is entitled to such improvements as have permanently improved the land, provided the value thereof does not exceed the value of the rents and profits.

But where a party improves land, with a knowledge of, or notice of a better title in another, he is not entitled either in law or equity to any diminution from the rents and profits by reason of said improvements.

The different acts of assembly allowing the value of improvements to be recovered at law, are reconcileable with the constitution to the extent above laid down, but no further.

Geo. S. Yerger, for plaintiff in error.

A. Cullom, for defendant.

GREEN, J. delivered the opinion of the court.

This action was brought to recover the value of improvements made upon the defendant's land. The defendant had

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action of ejectment from the plaintiff, and also recovered \$112, for rents and profits of the same land.

The plaintiff had notice of the defendant's better title before he made the improvements for which this suit is brought.

The judge charged the jury, that the statutes allowing pay for improvements to those who are turned out of possession by an action of ejectment, are unconstitutional.

The subject of the constitutionality of these acts of assembly, has been several times before this court, and although they have been commented on very much at length, yet a definite and satisfactory adjudication has not been made. To say that the act of 1805, c 42, shall be construed according to its literal import, and to give it effect to the whole extent that the legislature seem to have intended, would doubtless, be to impair the obligation of the contract which the State makes with every grantee of land. If a party who is in possession of another man's land, under an entry which may have cost him but a few cents, can make whatever improvements he may choose, notwithstanding he may know of the existence of the better title, and when turned out by an ejectment, may recover for the value of all such improvements, it is easy to see that he may in this way often become owner of the land, as a compensation for his trespass upon it; and although the legislature may not directly deprive the true owner of his land, and give it to another, yet in this way they may do the same thing indirectly.

It is not, however, now contended, that this extended operation can be given to these acts, but that the legislature had the power to give the party an action at law for so much as he could before have obtained in a court of equity. This principle is undoubtedly correct, and is fully conceded by Judge Overton in *Townsend vs. Shipp's heirs*, Cooke's Rep. 300, and is not denied by Judge Whyte in *Nelson vs. Allen and Harris*, 1 Yer. Rep. 383. The only difference of opinion in those two cases is, as to the extent of relief a court of equity would give a party who had made improvement's on another man's land. In the case of *Townsend vs. Shipp*, the court held, that if one take possession of land under a title believ-

ing the land to be his own, and under that belief makes improvements, equity would interpose in favor of such innocent possessor, and enjoin the claimant from taking possession, until by the rents and profits the improver could compensate himself for his labor. Cook's Rep 299. This principle, Judge Whyte, in *Nelson vs. Allen and Harris*, utterly repudiates and insists that equity will not sustain a bill for improvements by the occupant, whether he have or have not notice of the true owner's title—that no case showing such a precedent can be found, and that the court in *Townsend vs. Shipp*, were in error upon this subject, in following the civil law writers, who he says are not authority in our law, but are cited only as an ornament to discourse, when they agree with the law. But Judge Whyte admits that courts of equity in decreeing in favor of the owner for the rents and profits under special circumstances, will fix the time from which the account shall be taken, so as to compensate the possessor for improvements. This, he says, is not on account of any meritorious claim in the possessor, but by way of subtraction from the plaintiff for neglect or default.

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Take this to be the true principle upon which a court of equity acts, and it would follow, that as the possessor would be entitled under particular circumstances to a diminution of the recovery for rents and profits, the legislature might give him an action to recover that directly, which a court of equity would indirectly award. But although we cannot concur in the principle laid down by the court in *Townsend vs. Shipp* before referred to, to the whole extent there assumed, still we think the grounds assumed by judge Whyte are too restricted. At the last term of this court in the case of *Jones and others vs. Perry and others*, 10 Yer. Rep.* it was determined that Perry and Wheeler should be entitled to such improvements as bettered the condition of the estate, provided the value thereof did not exceed the value of the rents and profits. Further than this we are not disposed to go, and therefore, we are not of opinion that compensation

* Ante page 59.

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for improvements beyond the value of the rents and profits can be recovered. Taking the above principle as the ground of decision, it follows, that although the acts of assembly under consideration are not unconstitutional to the whole extent of their provisions, still the plaintiff was not entitled to recover in this action. The proof is, that before he made his entry and before he improved the land in this case, he had notice of Holliday's title. If, therefore, Holliday had filed a bill for rents and profits, McKinly would not have been entitled to any diminution of the decree to be made by reason of his improvements.

Upon the whole, if the court had charged the jury according to the principles established in this opinion, the verdict ought to have been for the defendant, and therefore the court will not reverse the judgment when another trial will produce the same result.

Judgment affirmed.

ESTELL et al. vs. MILLER's lessee.

The probate of a deed was as follows: "State of Tennessee, Franklin county, February term, 1820. Then the foregoing mortgage from John Dougherty to Luke Tiernan & Son, for eight acres of land, was duly acknowledged in open court and ordered to be registered." E. Russell, clk.: Held, that this was a sufficient probate.

This was an action of ejectment tried in the circuit court of Franklin county. Upon the trial, a mortgage deed from John Dougherty to Luke Tiernan & Son was offered in evidence, which was however, rejected by the court, because in the opinion of the judge, the probate endorsed on the deed was not sufficient. The probate is as follows: "State of Tennessee, Franklin county, February term 1820, then the foregoing mortgage from John Dougherty to Luke Tiernan & Son, for eight acres of land, was duly acknowledged in open court, and ordered to be registered." E. Russell clerk.

J. Campbell, for plaintiff in error.

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W. E. Anderson, for defendant.

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REESE, J. delivered the opinion of the court.

When this court was called upon at its March term, 1836, in the case of *Yerger vs. Young*, reported in 9th Yer. Rep. page 37, to review the decisions previously made upon the subject of the probate of deeds for the conveyance of lands, the cases of *Henderson vs. Crawford*, and *Green's heirs vs. Smith and Jones*, had not been reported, and were not therefore taken into consideration.

The court in the case of *Yerger vs. Young*, had no design to establish any new principle upon the subject of the probate of deeds, but only to reconcile the previous decisions so far as they could be, and deduce if possible a rule of action from them by which subsequent cases might be governed.

The court in that case say, "that this court at the last term having said, that not impeaching preceeding cases on this subject, they yet regarded them as having reached their utmost limit, the present becomes a fit occasion to review those cases for the purpose of discovering the pervading principle by which they are governed." The principle announced was, "that to make a good probate, there must be not a mere historical, but a record statement showing the character of the deed, by naming the parties and giving some general description of the property and showing the execution in one instance by the bargainor, in another by the proof of witnesses." That the court was extracting a principle and not establishing one, is evidenced by the remark which immediately follows, viz. "we seek not however to give a definition in decisions of this sort, the attempt is frequently alike unsafe and impracticable." The principle thus extracted is sought to be applied to the probate of the deed under consideration in the present case. The probate of this deed is in the following words:

"State of Tennessee, Franklin county, February term 1820, Then the foregoing mortgage from John Dougherty to Luke Tiernan & Son, for eight acres of land, was duly ac-

NASHVILLE, December, 1837, **known**edged in open court and ordered to be registered. Let it be registered." E. Russell, Clerk.

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This it is said is an historical and not a record statement of the probate, and according to the strict meaning of words it is true. But when the court said that it must be the record, and not clerk which speaks as to the validity of the probate, the remark must be construed in connexion with the context, and not as an abstract proposition.

In all the cases which were under review, the clerk had undertaken to certify as a fact, that the deed had been correctly acknowledged or proven, without showing the parties, the quantity of land, or any thing else, by which the court could judge whether it had been so done or not. This the court said was an historical statement, meaning thereby, that the clerk could not certify that the probate had been well made, but must show how it had been done, and must also describe the deed with sufficient certainty, so that the court might be enabled to judge that the particular deed had been proven.

The question as to whether there should be endorsed on the deed a literal copy of the probate certified by the clerk, as matters of record are required to be certified, was not presented to the consideration of the court, and a determination to that extent was not necessary in the case, and was not intended, as is evidenced by the commentary upon the case of *Ross vs. M'Clung*, in 6 Peter's Rep. of which the court said: "The probate was clearly bad, because it is the clerk and not the record which speaks, the clerk does not show by the record, but by his own proper assertion what was done, he does not state how done, but the legal effect or his own legal conclusion," and by the general remark, "that in every instance it was distrust of the clerk in making an historical statement, or giving his opinion of the legal effect of what was done"—from which it is evident that when the court used the words, "historical statement," they were considered as synonymous with the certified opinion of the court, as to the legal effect of the probate." These remarks have been thought necessary in order to show that the case of *Yerger vs. Young* is not conclusive upon the question under consideration.

This brings us directly to the question, as to whether this deed of mortgage has been properly proven. We think it has both upon principle and authority. The clerk has not taken upon himself the power to certify his mere opinion as to the validity of the probate, but he shows the parties to the deed and the quantity of land, and has certified that it was duly acknowledged in open court, which *ex vi termini*, imports that it was so done by the vendor. The words, "the foregoing mortgage has been," &c. in his certificate substituted in the place of the words, "a mortgage," (as it unquestionably exists on his record,) is in conformity with the practice of all the clerks in the State ever since there has been a registration law, and to reject a deed for this informality, would be indeed to stick in the bark. Such a decision never has been made and would be ruinous in its consequences. But we are not left to the necessity of deciding this case on principle alone. It came directly before the the court in the case of *Green's heirs vs. Smith and Jones*, 7 Yer. Rep. 487. There the probate was in the words following: "State of North Carolina, I, Isaac Alexander, clerk of the court of pleas and quarter sessions of Mulenburgh, at the court house in Charlotte, on the 4th Monday in February, in the year 1817, do hereby certify, that William Irwin, one of the subscribing witnesses to the deed, appeared in open court and made oath that the said Robert Irwin signed, sealed and delivered the within deed for the uses and purposes therein mentioned." This probate was held to be good, and the case is conclusive on the present, unless we are willing to overrule it, which we are not, on the point upon which it was determined, and which seems to have been the only question considered, though we think the case decidedly wrong upon another proposition, which has been fully discussed and decided by this court in the case of *M'Iver's heirs vs. Clay*, 9 Yer. Rep. 257.

NASHVILLE,
December, 1837.

Estell
v
Miller

This case will be reversed and remanded for a new trial.

Judgment reversed.

NASHVILLE,
December, 1837.

Atkinson
v
Brooks

ATKINSON vs. BROOKS.

A administered upon the estate of B, and died within six months thereafter. C then administered. From the time of the grant of administration to A, to the commencement of this suit more than two years had elapsed, but less than two years from the grant to C: Held, that the act of 1789, c 23, limiting suits against executors and administrators to two years did not bar the suit.

W. Thompson and W. A. Cook, for plaintiff in error.

Geo. S. Yerger and W. Johnston, for defendant.

GREEN, J. delivered the opinion of the court.

The suit in this case was commenced the 13th day of July, 1836, against the plaintiff in error, upon a simple contract debt entered into by his intestate in his life time. The defendant below pleaded that his intestate died in March, 1834, that one Drewry Brimson administered on his estate on 5th May, 1834, and died on the 24th August following, that himself and one Benjamin Kelly, since deceased, took out letters of administration, *de bonis non*, on the 4th August, 1825, and that more than two years elapsed after the first grant of administration upon the estate of his intestate, before the suit was commenced. To this plea there was a demurrer, which was sustained by the court below, and a judgment was rendered for the plaintiff, from which this appeal in error is prosecuted. It appears from the plea, that the first administrator died in less than six months after obtaining letters, and that two years had not elapsed after the second administration was granted, before this suit was commenced, but more than two years elapsed from the qualification of the first administrator, before the suit was brought. The question is, whether the act of limitations of 1789, c 23, § 4, is a bar to the action.

By the act of 1829, c 57, it is provided, that an executor or administrator shall not be liable to answer any suit which shall be commenced in six months after his qualification as such, and that all such suits may be abated or dismissed at the cost of the plaintiff. By the act of 1831, c 23, it is further provided, that any judgment obtained against an executor or

administrator within six months from the time of his qualification, shall be void, and it shall be the duty of such executor or administrator, to plead the act of 1829, c 57, to any suit brought against him in said time. In construing this very act of 1789, c 23, § 4, this court in the case of *Bradford vs. McLemore*, 3 Yerg. Rep. 318, says, "the act was passed to protect the property and estate of the deceased from all claims not demanded and sued for within two years after there was a representative subject to be sued and, a creditor capable of suing. The time to form the bar commences with the capacity to sue." To apply this principle, we have seen that the act of 1829, c 57, and the act of 1831, c 23, prohibited a suit to be brought until six months shall elapse from the qualification of the administrator; until after that time there was no representative subject to be sued "nor creditor capable of suing;" and before the expiration of that time, the first administrator dying, left the parties as though there had been no administration, until the plaintiff in error qualified. The acts of 1829 and 1831, before referred to, have the effect of suspending the operation of the act of 1789, c 23, § 4, during the period mentioned in those acts, before the expiration of which time it cannot be said that the said act of 1789, commences running. It is as though the provisions of these two acts were interpolated upon the act of 1789, making that act to say that no suit shall be brought against an executor or administrator, within six months after his qualifications as such, and all claims not prosecuted within eighteen months thereafter shall be forever barred. This construction of the several acts of 1789, 1829, and 1831, we think inevitably follows from the principles heretofore established by this court. As the first administrator died before the expiration of six months, the act did not commence running in his favor, and after his death it could not commence to run until the present plaintiff in error qualified. We think, therefore, there is no error in the judgment, and order that it be affirmed.

Judgment affirmed.

NASHVILLE,
December, 1837.

Atkinson
v
Brooks

NASHVILLE,
December, 1837

NEELY vs. WOOD.

Neely
v
Wood

A bill of sale takes effect from its execution and delivery, (although not registered) as against the donor and all who claim as volunteers under him.

Since the passage of the act of 1831, c 90, a parol gift of a slave, although accompanied by a delivery, is void, and passes no title to the donee.

R. J. Meigs, for plaintiff in error.

C. Ready, for defendant.

REESE, J., delivered the opinion of the court.

John Wood, the father of the defendant in error, conveyed to him several slaves by bill of sale, which was duly proved and registered. But after the execution of the bill of sale, and before its registration, John Wood, the father, made a parol gift of one the slaves to one Todd, his son in law, to whom he was delivered, who sold and conveyed by bill of sale, registered after that of John H. Wood's, the slave in question, to the plaintiff in error, against whom, to recover said slave, John H. Wood brought his action of detinue. Upon the trial much testimony was heard, tending to show that the sale and conveyance of the negroes, by the father to the son, was made to defeat or delay the recovery of alimony, in a suit brought by the wife of the former against him. The court charged the jury, 1st. That although they might believe the conveyance of the negroes from the father to the son, was intended to defeat the wife of the former in the recovery of alimony, still it would not be void as to Todd, to whom he made subsequently a parol gift of one of the slaves, nor as to those claiming under Todd. 2d. That the bill of sale from John Wood to John H. Wood, took effect from the time of its execution and delivery, as against John Wood and his son in law, to whom the gift was made. 3d. The court, deeming it unnecessary to the decision of the case, declined to give an opinion, whether the gift and delivery of possession of the slave in question to the son in law, would, as between the donor and donee, transfer to the

latter a valid title, without a deed or writing, but intimated, that the 12th section of the act of 1831, c 90, had probably changed the law on the subject, and that every gift of slaves without writing would be void, even between donor and donee. We deem these several propositions to be correct. The first announces the familiar principle, that a deed, void as against creditors, is yet good against the party making it, and those claiming under him, in right of representation or as volunteers.

NASHVILLE,
December, 1837.

Neely
v
Wood

The second proposition was maintained in the case of *Hay's lessee vs. McGuire and others*, 8 Yer. Rep. 92, and we think properly maintained. We assent to the reasoning upon that point in the case referred to.

3d. The circuit court was correct in supposing it not necessary to the determination of the case, to place a construction upon the 12th section of the act of 1831, c 90, nor is it necessary here. But as it is important, that society should early know how to act with a view to the provisions of that section, we think it proper to depart from our usual course of saying no more than is necessary to the decision of a case, and to observe, that in the intimation of opinion upon that section, which the circuit court gave, we think it was correct. The words of the said section in question, are, that "all deeds of gift for slaves shall be in writing, or the same shall be utterly void, and of no effect whatever," or, reforming the mal-collocation of the words, produced no doubt by accident or mistake, and making them as they stand, insensible and absurd, as follows, "all gifts of slaves shall be by deed or in writing, or the same shall be utterly void and of no effect whatever," it can be a matter of little difficulty to give the proper construction to words of such strength and directness. Before 1831, either a parol or written gift of slaves would have been void as against creditors. When the section in question, therefore, declares that a "parol gift of slaves shall be utterly void and of no effect whatever," it must mean as between donor and donee, as well as in other respects. Such is the plain meaning of the words, such the policy of the act, and such the construction which the courts of North Carolina have placed upon their

NASHVILLE, statute of 1806, containing a similar provision. Let the
December, 1837. judgment be affirmed.

Chrisman

v
Curle

Judgment affirmed.

CHRISMAN vs. CURLE.

The practice of the circuit courts to dispose on the first day of the term of causes which are not litigated, and to which no defence is intended to be made, is unobjectionable.

J. Campbell, for plaintiff.

M. Taul, for defendant.

REESE, J. delivered the opinion of the court.

This is an action of debt. It was tried in the circuit court below on the first day of the term, being number fifty-four on the docket, and no preceding case having been disposed of. It was admitted by the counsel for the defendant, and by the defendant himself, who was in court, that there was no defence against the action.

It appears from proof heard at the time by the court, that the practice had for some time been to call over the docket on the first day of the term, and to dispose of such cases as were without defence and unlitigated. This practice seems, however, not to have been at all times uniform. It is objected here, that the adoption of the practice in question has deprived the defendant of the delay which he would have obtained by the regular and consecutive trial of the cases according to their order of place upon the docket. But if this be to him a loss, it is not an injury. It is essential to the proper conduct and disposal of public business, and to the successful administration of justice, that the circuit court should possess and exercise the power of determining the course and order of their proceedings. Their discretion in matters of this description may be subject to the revision of this court, but it will be in cases where the discretion has been

so exercised as probably to have produced injury. We affirm the judgment. Nashville,
December, 1837.

Judgment affirmed.

Dowell
v
Bailey

DOWELL vs. BAILEY AND COCHRAN.

Where property is loaned by a father in law to his son in law, and the latter, after retaining possession thirteen years, re-delivers it to his father in law, who *bona fide* retained it as his property for eight days, and then re-loaned it to his son in law: Held, that the father in law does not forfeit his right under the provisions of the act of 1801, to creditors and purchasers of the son in law, who became such after the second loan, unless the son in law had five years possession after the second loan was made.

This is an action of trover, brought by Bailey and Cochran against Dowell, to recover the value of a negro slave Elias. The bill of exceptions shows that Dowell, on the marriage of his daughter with Dawson B. Harris, made a verbal loan to them of the negro in controversy, who remained in the possession of Harris thirteen years. In 1824, Harris and his wife parted, and Harris sent the negro in controversy to Dowell, with his wife. The negro remained in possession of Dowell eight days, when Harris and his wife coming together again, Harris requested Dowell to send him the negro for a week to pick out cotton. The negro was sent accordingly, and remained in possession of Harris two years, when Bailey and Cochran purchased him from Harris for \$900, and took a bill of sale which has been proved and registered. Dowell afterwards got the negro into his possession and refused to give him up.

The court charged the jury, that to entitle the defendant to claim said negro, by virtue of the redelivery of him to Harris, he must have had three years possession of said negro after said redelivery, and that if he was redelivered to him, and remained any time short of three years, and then came to the possession of Harris, the title of a purchaser from Harris would be valid against Dowell, although made after

NASHVILLE, said redelivery, and before five years had elapsed, from the December, 1837.

Dowell

v.
Baily

R. L. Caruthers, for plaintiff in error, cited 5 Munford's Rep. 101, 306, 307: 4 Mumford's Rep. 313: *Porter and Allison vs. Armstrong and Center*, 2 Yer. Rep. 74: *Walker vs. Wynn*, 3 Yer. Rep. 62, 73.

Hubbard and McLain, for defendants.

GREEN, J. delivered the opinion of the court.

The charge of the judge indicates that his understanding of the operation of the act of 1801, c 25, is, that the negro having been possessed by Harris for more than five years, became his property. For if the property were not vested in Harris, there was no reason for telling the jury that it would require a possession of the slave three years by Dowell, in order to give him a title better than that of a purchaser from Harris. But this court has decided in the case of *Andrew vs. Hartsfield*, 3 Yer. Rep. 40, and *Walker vs. Wynn*, 3 Yer. Rep. 13, that the third section of the act of 1801, c 25, "applies only as between the lender and borrower, and saves the right of the former to reclaim and recover the property loaned." Although, therefore, for the benefit of creditors and purchasers, if a verbal loan be made, and the borrower retain possession for five years, the property shall be deemed to be with the possession, still the borrower himself has acquired no title that he can set up against the lender.

Hence it follows, as decided by this court, in the case of *Walker vs. Wynn*, that if the person who made the loan, regain possession and hold the property *bona fide* for himself, and afterwards make another loan of the same property to the same person, he does not forfeit his right to creditors or purchasers who become such, after said second loan, unless the property be held five years by the loanee, from the date of said second loan. Nor is it required that the owner shall have any particular length of possession, in order that his title may be thus preserved. It is sufficient if he has the property back, in his possession, holding it *bona fide* as his own.

The charge of the court in this case, that Dowell must

have held possession of the negro three years, or his title would not be good against the purchaser from Harri3, is erroneous. Reverse the judgment and remand the cause for another trial.

NASHVILLE.
December, 1837

Carney
v
Carney

Judgment reversed.

CARNEY vs. CARNEY.

Where a defendant in an execution, who resided on the land levied on, was present at the sale, but did not aid or assist in the sale: Held, that this was not a waiver of the twenty days notice in writing, required by the act of 1799, c 13.

The only question in this case arose upon the charge of the court below to the jury. The charge is stated in the opinion of the court, delivered by Judge Green.

W. Thompson, for plaintiff in error.

Geo. S. Yerger, for defendant.

GREEN, J. delivered the opinion of the court.

We have not thought it necessary to notice several of the questions which have been made in the argument of this case. We think the court erred in that part of the charge in which the judge says, "that if the defendant in the execution, who resided on the land, did not have twenty days notice in writing, but was present and knew of the sale and did not object to it, but permitted it to go on without claiming the twenty days notice in writing from the sheriff, and without notifying the persons whom he saw bidding for it, that he had not had such notice, that he was bound by it, and that the sale was not void on that account."

This is going much farther in making the act of the party evidence that he had received the twenty days notice required by the act of 1799, c 14, § 1, than the opinion of this court, in the case *Noe vs. Purchapile*, 5 Yer. Rep. 216, warrants. In the conclusion of the opinion in that case,

NASHVILLE,
December, 1837.

Carney
v
Carney

the court says. "The defendant by his conduct assisted in making the sale, stood by at the time, and had an understanding with the purchaser for his benefit. All this amounts to a waiver of notice."

We approve the decision in that case, and think that in all cases where the defendant is present, assisting at the sale, or by other act, evinces his willingness that it should go on, it is a waiver of the notice required by the act, or evidence that such notice was actually given. In such case, the party by his acts would show that he possessed all the knowledge he wished, or that would be useful to him. As the notice required by law is for his benefit, he may waive his right to require it. And if he should do so, either by express words or by acts equivalent thereto, he shall not afterwards be heard to say he had not the notice required by law. But to say, that if the defendant in an execution is present at the sale of his land, and does not object to it, and notify the bidders that he has not had the notice, he shall be bound by his silence, and shall not afterwards object to the sale for want of the notice, is going too far. It is enough, in my opinion, to hold the sale valid, if he shall actually promote it, or consent that it may be made—his mere silence is not sufficient. Reverse the judgment and remand the cause.

Judgment reversed.

NASHVILLE,
December, 1837.

THOMPSON vs. STACY.

Thompson
v
Stacy

A dowress cannot maintain an action of assumpsit for use and occupation against a tenant from year to year, for rents which accrue after the death of her husband, and before the assignment of her dower, although no damages were given to her when her dower was assigned.

Under the statute of 1784, c 2, § 9, authorising the widow to file her petition in the county or the circuit court of the county where her husband usually resided, if the right to dower is disputed, a jury must be empannelled to try it, and the damages are to be assessed by the jury.

If, upon a petition filed under said statute, the widow's right to dower is not disputed, and she claims damages which are not admitted, a writ of enquiry must be awarded to ascertain them.

If the widow's dower be assigned, under the provisions of the act of 1784, and no damages are assessed or given to her in that proceeding, her right to recover damages is forever gone.

If a separate and distinct action would lie by a widow to recover damages after an assignment of dower, it must be brought against the tenant of the freehold, whose duty it is to assign dower, and not against a tenant for years.

C. Ready, for plaintiff in error.

R. J. Meigs, for defendant.

TURLEY, J. delivered the opinion of the court.

The question presented for the determination of the court in this case is, whether a dowress can maintain an action of assumpsit for use and occupation against a tenant from year to year, to recover rents which accrued after the death of her husband, and before the assignment of her dower, no damages having been decreed to her when dower was assigned. A correct consideration of this question requires an examination of the nature of an estate in dower, and the remedies provided for its recovery and enjoyment by the common and statute laws of Great Britain, and the changes which have been made relative thereto by the statute laws of the State of Tennessee.

By the common law a widow is entitled to dower in the one-third part of all the real estate of which her husband was seized during coverture. This right commences with the

marriage and is consummated upon the death of the husband; yet, nevertheless, no right of entry accrues till an assignment of her interest has been specially made. This, it has been observed, is probably the only instance in which a title, though complete and unopposed by any adverse right of possession, does not confer on the person in whom it is vested the right of reducing it into possession by entry; her situation in this respect, is an anomalous case in the law of England, standing upon its own particular circumstances, and neither borrowing or affording any analogies. Park on Dower, 334. To such an extent has this principle been carried, that the entry of the wife upon her husband's death without assignment is treated as an abatement, and a dowress in under a void assignment may be treated as a *disseisor*. Dal. Rep. 100: Burrow's Rep. 111.

The reason the law denies a right of entry in the wife, although her title is consummate, is to be found in the injustice which would result from permitting her to carve for herself such portions of her deceased husband's estate as might please her, without regard to the rights of the heirs at law or devisee; and that her title to be endowed, is not of an undivided third of the entirety, but of a third part in severalty, which third part is unascertained till assignment, and therefore bearing no analogy to the case of coparceners, or other persons entitled to undivided shares. Park on Dower, 335, 336. The necessary results from this principle of law are, that upon the death of the husband, his real estate descends to his heir at law, or devisee, who has the undivided seizen till an assignment of dower has been made, and who alone can receive rents and profits, and bring suits to recover the possession, and for injuries done to the estate. That until an assignment has been made, there is no privity either of estate or of contract between the widow and any tenant of the estate, and that she can maintain no possessory action if any assignment of her dower is refused. By the statute of *Magna Charta*, dower is to be assigned within forty days after the death of the husband, but if this be not done, and the widow be compelled to resort to legal means to enforce an assignment, her remedy is by a writ of dower *unde nihil habet*, or by a writ of right of dower, which can be

brought against no one but the tenant of the freehold, because the assignment of dower being an act involving the interest of the persons entitled to the inheritance, it is ^{NASHVILLE, December, 1837.} that no one shall be legally competent to assign dower who has a less estate than one of freehold. They therefore lie against a guardian in socage or any person who has a chattel interest, as tenant by elegit, or tenant for year. ^{Thompson} Dow, Pl. 68: 9 Rep. 17: Park on Dower, 285. In either of these modes of proceeding, she obtains her dower is assigned by the sheriff on the land, and then proceed to recover possession by ejectment. P.

The writ of dower, *unde nihil habet*, is used in cases where no dower has been assigned, but if part have been assigned the proper remedy is the writ of right of dower. This is more general, extending either to a part or the whole. Both of these are writs of right. Park on Dower, § 1.

Dower having then to be recovered by a real action, damages were at common law recoverable by the writ of dower in detention, because damages can only be given for a wrongful detention of the possession, and in writs of right where the right itself is disputed, no damages are given, because no action lies until the right is determined. Coke Lit. 32, b. 1: 86: 1 Cruise, 169: 2 Institutes, 286: 10 Coke, 21.

This rule however, was partially remedied by the Statute of Merton, passed 20th Henry III, c. 1, which provided that "widows which, after the death of their husbands, be forced of their dowers, and cannot have their dower assigned without plea, whosoever do force them of the same, or quarantine of the lands whereof their husbands die, shall be convicted of such wrongful deforcement, shall pay damages to the same widows, that is to say, the value of the dower to them belonging from the time of the death of their husbands, until the day that the said widows by judgment of our court have recovered seizin of their dower."

By damages are to be understood the profits of the part of the estate since the death of the husband, deducting outgoings, and such damages as the wife has suffered by the detention of her dower. Doct. and Stud.

NASHVILLE, Hargrave's Coke Lit. 32, b, n. 4: 1 Leon. Reports, 56: 2
December, 1837.

Thompson

v

Stacy

Barnes' Rep. 181: Park on Dower, 306.

The statute of Merton, in giving damages, has specified no particular method of ascertaining them, but has left the manner of doing so to the discretion of the court, and the practice adopted is, unless the damages are either admitted by the party, or ascertained by the jury who try the action, to grant a writ of enquiry, and if judgment is given for the demandant by default, confession or any other way than by verdict, there must of necessity be a jury empannelled to assess the damages. 2 Barnes' Rep. 442: Hargrave's Coke Lit. 32 b, n. 4: Park on Dower, 307.

But if the heir or feoffee assigns dower and the widow accepts thereof, without an allowance for her damages, she cannot afterwards claim them, because having accepted dower, which is the principle, she cannot afterwards sue for damages which are only accessory. Coke Litt. 33 a: 1 Cruise's Digest, 170: Park on Dower, 310. For the same reasons, if she have judgment final on a writ of right of dower without an assessment of her damages, she shall not afterwards have a separate action for their recovery.

This is a brief review of the redress extended by the common law courts in England to widows in relation to their dower rights. The court of chancery, as early as the reign of queen Elizabeth, began to assume a remedial jurisdiction on claims of dower, the progress of which it is unnecessary for our present purpose to trace, it being sufficient to observe that although relief is now readily extended in that court to widows claiming dower, yet it is universally admitted that the question of right, if controverted, must be sent to law to be tried by a jury. 2 Brown's C. C. 631, 633, case of *Custis vs. Custis*: 2 Vesey, jr. 128, case of *Mundy vs. Mundy*: 2 Sch. and Lefroy, 391, *D'Arcy vs. Blake*: and that in assessing damages under the statute of Merton, the same construction is given as at law, and that no bill will be retained which is filed only for an account of rents and profits which accrued between the death of the husband and the assignment of dower.

It is then obvious that previous to the passage of the stat-

ute of Merton a dowress had no remedy whatever for the recovery of the mesne profits of her estate, which had accrued from the death of her husband to the time of the assignment of her dower, that after the passage of that statute, they could only be recovered as damages in a writ of dower, or a bill in equity filed for the purpose of having her dower assigned, neither of which could be prosecuted against any person but the tenant to the freehold, and that no separate action can be brought for their recovery against him, much more can it not be brought against a tenant, having only a chattel interest in the estate, against whom a dowress has no cause of action whatever except for rents which accrue after the dower has been assigned.

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We next proceed to enquire what changes have been made relative to this subject by the statute laws of this State. There are but two; one in relation to the estates of which she shall be endowed, and the other in relation to the remedy to be pursued for the recovery. By the act of 1784, c 22, § 8, widows, instead of being entitled as they were at common law to dower in one-third part of all the lands of which their husbands were seized during coverture, are only thus entitled in the lands of which they die seized or possessed. And by the act of 1784, c 2, § 9, they are authorised to file a petition in the circuit court or county court of the county where their husbands shall have usually dwelt before their death, the proceedings upon which shall be in a summary manner, and be heard and determined at the first term of the court, provided the party petitioning shall have given ten days previous notice to the heirs and executors or administrators of her deceased husband. This statute further provides, that a jury of twelve men shall be summoned by the sheriff, who shall allot and set off to the widow her dower, but makes no provision for the recovery of the mesne profits, from which it is argued, that inasmuch as the common law mode of proceeding by a writ of dower is obsolete, and as the statute has only authorised the court to empanel a jury to allot and set off the dower, and has not given it the power to assess the damages given by the statute of Merton, the widow is left without remedy unless she can maintain an action of assumpsit for their recovery.

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We do not assent to this reasoning. In the passage of this statute there was no intention to alter the relative rights of the dowress, and the heir or devisee, or to establish new relations between her and the tenant of the estate, but only to substitute the more simple and expeditious remedy by petition, in the place of the more tedious and complicated one by writ of dower or bill in equity. And for us to say that because the statute has specified the mode by which the dower shall be allotted and set apart, that the court has not power to do more, would be productive of the worst consequences, and destroy the remedy by petition. It frequently happens that the right of dower is disputed; when this is the case, how is the question to be settled? The statute makes no provision for it, does it therefore follow that it cannot be determined? Surely not. We have seen that the heir at law is to have ten days notice of the proceedings, for what purpose, but to protect his estate against the claims of those who have no right, and to see that the dower is set apart in a fair and equitable manner? If then the right may be controverted, how is it to be settled? not by the court, for no such power is given in the statute. And we have seen that where the right is disputed in chancery, the question must be sent to law to be tried by a jury and in proceedings by a writ of dower, the right, if disputed, is always submitted to a jury; and so it must be under our statute, authorising a proceeding by petition, or either the court must usurp the province of the jury, which is illegal, or the tenant to the freehold is left without the power of protecting the estate from false and unfounded claims.

If then the court must of necessity have the power under the statute to empanel a jury to try the question of right, why shall it not also have the power to empanel a jury to assess the damages given by the statute of Merton. Justice to the widow makes it necessary to do the one, as does justice to the heir or devisee to do the other. We have seen that the statute of Merton specified no particular method of ascertaining the damages, and that the courts established the practice of doing so by a writ of enquiry, unless they were admitted by the defendant, or ascertained by the jury who tried the action, and so it must be under our statute. If the right is dis-

puted, the jury empannelled to try the issue may assess the damages, but if the right be not disputed and the damages are not admitted, they must be assessed upon a writ of enquiry, and if this be neglected and a final judgment be given by the court upon the petition, the widow forever loses her damages in the same manner as if she had received from the tenant of the freehold an assignment of her dower, without her damages, or had permitted a judgment final in a writ of right of dower, without having them assessed by a jury.

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But if all this were not so, and the argument that a separate action is given could be sustained, it is clear that it must be brought against the tenant to the freehold, whose duty it is to set apart the dower estate, and not against a tenant for years, who has no privity either of estate or contract with the widow, until her dower is assigned. For these reasons the judgment of the court upon this case agreed, must be for the defendant.

Judgment accordingly.

TROTT vs. WEST, Moss & Co.

The act of 1801, c 6, § 59, which says "that not more than two new trials shall be granted to the same party," means that when the facts have been fairly left to the jury upon a correct charge of the court, and they have thrice found a verdict for the same party, no new trial shall be awarded; it does not apply to cases where verdicts have been set aside for error in law.

In general, if the bill of exceptions does not state that all the evidence in the cause is contained in it, the court will presume the evidence was sufficient to support the verdict.

R. J. Meigs, for plaintiff in error.

J. Campbell and T. H. Fletcher, for defendants.

GREEN, J. delivered the opinion of the court.

In this case a trial was had at the May term, 1836, of the Warren circuit court, and a verdict was had for the defend-

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ants in error, who were plaintiffs in error, which was set aside by the court and a new trial awarded. At the succeeding term of the court the cause was again tried, and the plaintiffs obtained a verdict, which the court refused to set aside, but gave a judgment thereon; from which judgment an appeal was prosecuted to this court. At the last term, this court reversed the judgment of the circuit court for misdirection of the jury as to the law of the case, and remanded the cause for another trial. At the last May term of said circuit court the cause was again tried and a verdict was rendered for the plaintiffs which the court refusing to set aside, this appeal is prosecuted.

The counsel for the defendants in error insist, as there has already been two new trials in the cause, the court is forbidden by the act of 1801, c 6, § 59, to grant another. The act says "that not more than two new trials shall be granted to the same party." This means, that where the facts of the case have been fairly left to the jury upon a proper charge of the court, and they have twice found a verdict for the same party, each of which having been set aside by the court; if the same party obtain another verdict in like manner, it shall not be disturbed. But this act did not intend to prevent the court granting new trials for error in the charge of the court to the jury, for error in the admission of, or rejection of testimony, for misconduct of the jury, and the like.

This we should consider the proper construction of the act, if we were now for the first time called upon to expound it; but such having been the uniform practice of the courts since its passage, we are the better satisfied with this view of it. Taking the interpretation of the act here given to be the true one, and it will be seen its provisions are not in the way of this court granting the new trial now asked for. There have been but two new trials heretofore granted to the same party in this cause, and one of them having been awarded by this court for the misdirection of the jury by the circuit court, we would be at liberty to grant a new trial again in the same cause.

2. But defendants in error insist that there is no evidence in this record that all the proof is set out in the bill of excep-

tions, and consequently, we are to presume that there was evidence to justify the verdict. The court concurs with the counsel in this view of the case. There is certainly nothing in the peculiar nature of the question in issue, and the proof by which it must have been supported, to indicate satisfactorily that all the evidence is set out in the record, nor is there any expression used indicating that all the proof was contained in the bill of exceptions. The rule, therefore, is as contended by defendants counsel, that the court in such a case will presume there was testimony to warrant the verdict. Let the judgment be affirmed.

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Tally
v
Butterworth

Judgment affirmed.

TALLY vs. BUTTERWORTH.

To constitute a good *nun-cupative* will, by virtue of the provisions of the act of 1784, c 25, § 15, the making thereof must be proved by two witnesses, both of whom were present at the same time and heard the same declaration.

The *factum* or making of a *nun-cupative* will cannot be proved by two witnesses, neither of whom at one and the same time heard the same declaration, but each of whom heard a different declaration made at a different time, but both in substance of similar import

T. Butterworth, in his last sickness, intending to dispose of his property to the plaintiff, Eleanor Tally, by a *nun-cupative* will, called upon a witness, Clements, and stated that he wished to make his will, and thereupon declared that he wished and desired his property to go to his niece, Eleanor Tully. No person but Clements was present when this declaration was made, but the decedent requested him to send some other person to whom he might make the same declaration. Clements in about a half hour, sent the witness, Carr, to whom the decedent made the same declaration. He requested both witnesses to take notice that it was his will. The above declarations were afterwards reduced to writing within the time required by the act of 1784, c 22, and were

NASHVILLE, offered for probate as the *nun-cupative* will of said Butterworth, deceased.
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The judge below charged the jury, that to make a good *nun-cupative* will, both the witnesses required by the act of 1784, c 22, must be present at the same time and hear the declaration; and that the same declaration repeated at different times to different witnesses; not more than one being present at any one time, would not be sufficient.

J. J. White, for plaintiff in error, insisted, that a *nun-cupative* will proved by two witnesses, although the declaration of the testator as to the disposition of his property was made at different times and when both were not present at the time, was valid; that the case was within the words and spirit of the 1784, c 22, § 15.

J. S. Yerger, for defendant in error, cited and commented on the following authorities; 1 Williams on Ex. 58 to 64: 1 Eccl. Rep. 227, 230: 2 do. 147: 2 Black. Com. 500, 501: 4 Kent's Com. 518.

REESE, J. delivered the opinion of the court.

The principal question arising upon the record before the court is, whether the *factum* or making of a *nun-cupative* will can be well proved under the provisions of the 15th section of the act, April, 1784, c 22, by two witnesses, neither of whom at one and the same time heard the same declaration, but each of whom heard a different declaration made at a different time, but both in substance of similar import. The section is, that "no *nun-cupative* will in any wise shall be good where the estate exceeds \$250, unless proved by two witnesses present at the making thereof, and unless they or some of them were specially required to bear witness thereto by the testator himself and unless it was made in his last sickness." This language is perhaps so plain, that any effort to illustrate may serve only to obscure it. The act of valid *nun-cupation* under the statute, must be proved by two witnesses present when such act of *nun-cupation* takes place. A *nun-cupative* will under the statute may be defined to be, a verbal

declaration, made by one in his last sickness as to the disposition of his property after his death, made with the intention and purpose to dispose of such property, and made also in the hearing and presence of at least two credible persons, who shall attest the same, and who, or at least some of them were then by the testator himself specially called on to hear and bear witness to such declaration. The presence of two witnesses and what is technically called the *rogatio testium*, are as necessary elements of the statutory *nuncupation* as the declaration of the testator himself. If the declaration be made on Monday in the presence of one witness A, and a declaration of similar import on Tuesday in the presence of one witness B, and on Wednesday a similar declaration in the presence of one witness C, it may be true as has been argued, that the purpose and intention of the testator would as fully be made manifest, and be as certainly established, as if A and B had been together present on that day and heard and attested the same declaration. But still it could not be said in the language of the statute, that there were two persons present at the making of any one of these declarations, nor that they or some of them, namely, the persons present were called on, &c. The latter words which require the *rogatio testium*, so far from showing that the several witnesses testifying to different declarations will satisfy the statute, show the contrary. They, the witnesses present, or some of them, must be called on, &c. which simply means, that although all must be present and perhaps hear and prove the *rogatio*, all need not be specially called upon. This section of our act of 1784, is copied and somewhat abridged from the 19th section of the statute of Frauds, 29th Ch. II. c 3. That section is as follows: And for prevention of fraudulent practices in setting up *nuncupative* wills, which have been the occasion of much perjury; Be it enacted by the authority aforesaid, that from and after the aforesaid four and twentieth day of June, no *nuncupative* will shall be good where the estate thereby bequeathed shall exceed the value of forty pounds, that is not proven by the oaths of three witnesses, (at the least,) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same, did bid the per-

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sons present, or some of them, bear witness that such was his will, or to that effect," and unless, &c.

This section more amplified indeed than the corresponding section of our statute of similar import, cannot be read and leave any doubt upon the mind, it seems to me, with regard to the question before the court. That question, it may be remarked, so plain and unambiguous, perhaps, has never been decided—it seems never to have been even raised or discussed in England, nor indeed in this country, till the present time.

The 5th section of the same act of Ch. II. which requires that a "devise of land shall be in writing, signed by the devisor," "and shall be attested and subscribed in the presence of said devisor, by three or four credible witnesses," presented very early to the English courts, the question whether the attesting witnesses should subscribe in the presence of each other. Neither the words of the section nor the nature of the transaction seemed to require that they should so have been present; for the will in writing would identify itself, and their attestation at different times would comply with the words of the statute, if done in the presence of the devisor; yet the contrary was sometimes held, although finally settled in favor of separate attestations. But these decisions have no bearing on the question before us, because in the words of the statute and in the nature of the transactions, the cases are wholly different. The writing unchangingly evidences the intentions of the devisor—the attestations of witnesses verify the writing. But in the other case, the will is but the breath of the testator, made articulate and preserved in the memory of the witnesses. The fact of speaking and the things spoken, are alike to be proved by the witnesses. And the statute has seen proper to require, that to evidence, identify and perpetuate a will of a character so fleeting and so liable to mistake, it should at the moment of making, be executed, if I may so speak, in duplicate, that is, the same identical declaration should be heard and proved by two witnesses. Such, I think, is the very letter of the statute, and if so, it is not a case for giving a construction according to any supposed equity of the statute. For in the case of *Liman vs. Bonsal*, 1 Addam's Eq. Rep.

Sir John Nicholl says, "*nun-cupative* wills are not favorites with courts of probate." He adds, "much more is required to the due proof of a *nun-cupative* will, than of a written one in several particulars. In the first place, numerous restrictions are imposed upon such wills by the statute of Frauds, 29 Ch. II. c 3, § 19, the provisions of which must be, it is held, strictly complied with to entitle any *nun-cupative* will to probate, consequently the absence of any one of these is fatal at once to a will of this species. But added to this and independant of the statute of Frauds, altogether, the *factum* of a *nun-cupative* will requires to be proved by evidence more strict and stringent in every single particular." In the case of *Bennett vs. Jackson*, 2 Phillimore, 190, the same principle is determined by the same judge. Upon the whole, I am of opinion that the judgment ought in this case to be affirmed.

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Judgment affirmed.

WOOD vs. ORR.

A sheriff who does not reside in the "county" or "district" from which an execution issues, is not liable to be proceeded against by motion for a failure to return the process.

The act of 1835, c 19, § 6, subjecting sheriffs and their sureties to judgment on motion for a failure to return process, whether the sheriff lives in the "district" or "county," from whence the execution issued or not, is prospective in its operation, and only applies to defaults subsequent to the act.

T. Washington, for plaintiff in error.

W. E. Anderson, for defendant.

REESE J. delivered the opinion of the court.

An execution was issued at the suit of the plaintiff from the county court of Franklin county and was placed in the hands of the defendant as sheriff of Bedford county. The

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execution was returnable to the November term of the Franklin county court. It was not returned, and this motion was made against the sheriff of Bedford and his securities, for default in that respect. Was the sheriff liable to this motion by virtue of the provisions of the act of 1803, c 18, § 1? That act renders the sheriff and his securities liable upon motion, for the amount of an execution which he may fail to return, when the execution has issued from the court of the county or of the district in which he may reside. The execution issued from the county court of Franklin, and the sheriff resided in the county of Bedford. The case then does not fall within the words of that statute, and as the statute confers a summary remedy, not according to the course of the common law, and of a character highly penal, it is not competent for this court by judicial construction to enlarge and extend its operation, so as to embrace cases excluded by its terms. If a principle so obvious and of such force, needed to be fortified by authority, we understand the point to have been so ruled by the supreme court at Reynoldsburgh, in a case not reported.

2d. Is the defendant in this case liable by the provisions of the act 1835, c 19, § 6. That act was passed in fact in February, 1836. Its terms are sufficiently comprehensive to embrace this case, and it purports to give a remedy by motion in the circuit court for the non-return of an execution, as well in those cases where the default had already taken place, as in those in which it might thereafter take place. If Orr had been liable under the existing laws to a motion against him in the county court of Franklin, it would doubtless have been competent for the legislature to have conferred upon the circuit court of Franklin, power and jurisdiction to have enforced that liability. But we have seen that he was not so liable. The act of February, 1836, therefore, not only seeks to furnish to the plaintiff as against Orr, a remedy which did not before exist, but it for the first time creates for him the right also. Before that act and at common law, the right of the plaintiff was to recover against Orr such damages for the non-return of the execution as he might have sustained by the default of Orr, which in case the defendant in the execution had been insolvent might have been nominal damages

merely. But the act creates the right to recover by motion, the whole amount of the execution. The law, therefore, creating this new right and furnishing this new remedy, cannot be permitted to have a retro-active application to cases of pre-existing default. It is true, indeed, that before the act of 1836, as well as since, the sheriff would be liable to proceedings against him, as for a contempt for the non-return of the process of the court.

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But the right and the remedy given by that act, do not proceed upon this principle, for although the plaintiff in an execution may by the provisions of that act, obtain against a sheriff and his sureties, judgment for the non-return of the execution, the sheriff is still liable to be proceeded against as for a contempt for the non-return of the process. The judgment will therefore be affirmed.

Judgment affirmed.

PAYNE vs. LASSITER.

A remainder in a slave or other chattel, to vest in possession after the determination of a life estate therein, cannot be created by a parol declaration or sale; such remainder, to be valid, must be evidenced by a deed, will or other writing.

Under the provisions of the act of 1784, a parol sale of a slave, accompanied by delivery of possession, is valid between the parties, but a parol sale of a slave, unaccompanied by delivery, and to take effect after the death of the vendor is void.

This is an action of detinue. On the trial below it was proved that Joel Brown wished to raise money, and expressed an intention of selling the negro Peter, now in controversy. On the 10th of August, 1826, he offered to sell him to the plaintiff, Payne, upon the following terms, to wit: That he, Brown, would reserve to himself a life estate in said negro for his life time, and at his death the slave to go to Payne, if he Payne would pay him \$200. To this proposition Payne acceded, and paid him the money. Peter,

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the negro, was not delivered to Payne at any time, but remained in the possession of said Brown until his death, in 1835, when he came to defendant's possession, to whom he was bequeathed in said Brown's will. There was no bill of sale or other writing signed by Brown, but the whole contract about Peter was verbal. The defendant had the negro in his possession when the suit was brought, and refused to deliver him to plaintiff. The court charged the jury, "that a remainder in a slave could not be created by a verbal declaration and sale, but only by deed, will or some other writing; and that if the remainder in said slave Peter was created by verbal contract, it would be void at law and pass no title to said slave. The court further instructed the jury, that whether the remainder in said slave was void at common law or not, if said slave Peter was sold to said Payne by Brown, and no bill of sale made at the time, or other writing, nor possession of said Peter, delivered to said Payne, then said sale was invalid, and would not pass the title of said slave to Payne, although the purchase money was paid. That under the provisions of the act of 1784, in order to make the sale of a slave valid in this state, possession of the slave sold must be delivered by the vendor to the vendee, or a bill of sale in writing executed. The jury found a verdict for defendant. A motion for a new trial was made and overruled, and an appeal in the nature of a writ of error to this court.

F. B. Fogg and W. A. Cook, for plaintiff in error. 1. By the ancient common law, no remainder in personal property could be created, but it has long since been settled, that it may be done. 2 Kent's Com. 352, and authorities there cited. In the sale or disposal of personal property, at the common law, no deed or writing was required. Personal property of every description was the subject of parol contract, and the moment the courts of common law determined that a remainder in personalty might be created, they necessarily determined that it might be raised by such evidence as was competent by the common law, to pass an interest in personalty.

A parol sale of a chattel not in existence, or to be deliv-

ered at a future period, is valid as an executory agreement at the common law; and in these executory contracts, when the time arrived for delivery, the contracting parties acquire mutual rights to demand, the one the goods the other the price; and the vendor may maintain trover for the goods, if they are not delivered, upon tender of the price. Ross on Vendors, 42, 43: 12 Law Lib. 23: Noy's Maxims, 42: *Towers vs. Osborn*, 1 Strange's Rep. 506: *Mucklow vs. Mangles*, 1 Taunton's Rep. 320.

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2. This sale is not void by the act of 1784, c 10. It has long been settled, upon the construction of that act, that a verbal sale is good between the parties, as at common law, and that the sale was only void as to creditors. 1 Hay. 58: 2 Hay. Rep. 66-86: 1 Murph. Rep. 466.

J. S. Yerger and J. J. White, for defendant in error.

1. The act of 1784 requires all sales of slaves to be in writing or they are void. 1 Hay. and Cobbs, 24: Caruthers and Nick. Rev. 676.

The construction of that act, that a sale and delivery of possession of a slave is good to pass the title without writing does not embrace this case. If neither the possession of the slave be given at the time, nor a bill of sale or other writing be given, the sale is within the act and void. There must be either a bill of sale or delivery of possession to pass the title: hence a sale of a slave to take effect after the death of the vendor is void. 1 Hay. and Cobb. 24: Car. and Nick. Rev. 676: 2 Yer. Rep. 585: 5 Do. 281: 8 Do. 385: 9 Do. 73.

Any other construction than this of the act of 1784, instead of preventing, as that act was designed to do, would encourage the commission of frauds and perjury.

2. The remainder in this case limited to take effect after the determination of the life estate, reserved by the vendors is void. No remainder can be limited of a slave but by deed, will or other writing. 2 Bla. Com. 398: 2 Kent's Co. (2d ed.) 352: 2 Yer. Rep. 585: Noy's Maxims, 80, 158, 159, (2d Am. ed. of 1824,) side pages 32. 100, 101: 2 Day's Rep. 52, 26.

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REESE, J. delivered the opinion of the court.

The plaintiff brought against the defendant an action of detinue for a negro slave. It was proved on the trial that one Joel Brown, under a bequest in whose will the defendant claimed title to the negro in question, wishing in August, 1826, to raise money, offered to sell the slave to plaintiff on the following terms, to wit: "That he, Brown, would reserve to himself a life estate in said slave, and that at the death of Brown, the slave should go to Payne, if Payne would pay to him \$200." This offer was accepted by Payne, and he thereupon paid the money to Brown. The slave was not at the time of the contract, nor at any time delivered to Payne, but remained in the possession of Brown till his death, which took place in 1835; when he came into the possession of defendant, under a bequest in Brown's will. There was no bill of sale or other writing signed by Brown in evidence of the contract as to said slave, but the agreement on the subject was merely verbal. Upon this state of facts the court charged the jury, that a remainder in a slave could not be created by a verbal declaration and sale, but only by deed, will or other writing, and if the remainder in the slave was created by verbal contract it would be void at law, and pass no title to the slave. The court further charged the jury, that whether the remainder in the slave was void or not, if the slave was sold by Brown to Payne, and no bill of sale was made at the time, or other writing, nor possession delivered to Payne, then the sale would be invalid and not pass the title to Payne, although the purchase money was paid by him. That under the provisions of the act of 1784, in order to make the sale of a slave in this state valid, "possession must be delivered by the vender to the vendee, or a bill of sale executed. A verdict was rendered in favor of the defendant, a motion for a new trial was made by the plaintiff, which having been overruled by the court, an appeal in the nature of a writ error has been prosecuted to this court.

Upon the charge of the circuit court to the jury, two questions arise, 1st, Can a remainder in a slave, or other chattel be created without will or deed, or other writing, to take

effect after the determination of a life estate interest reserved? 2d. Under the provisions of the act of 1784, can a parol gift or sale of a slave be held to be valid, as between the parties, when such parol gift or contract of sale is neither accompanied nor followed by the delivery of the slave to the donee or bargainee. As to the first point, it may be remarked that anciently there could be no limitation over of a chattel interest, but a gift for life, carried the absolute interest, and of course therefore it would seem, that a reservation for the life of the grantor, would continue in him the absolute interest. As early as the time of Coke, Manning's case, 8 Coke, 95, it was settled that chattels real might be so limited by will, and it has since been well settled, that a personal chattel may be also given by will to A for life, with remainder over to B, and the limitation over after the life interest in the chattel has expired, will be good. In *Child vs. Baylie*, Cro. J. 450, the court speak of such a remainder as being created equally by grant or devise. See 2 Kent's Com. 352, (2d ed.) That a remainder can be created in a chattel by will or deed, is established by numerous American decisions. In North Carolina indeed, in several cases, it has been ruled, that the limitation of a remainder in a slave by deed, is not good. These courts seem to regret that they have got into such a train of decisions. The contrary, however, has been determined in this state, in the case of *Cain and Wife vs. Marly*, 2 Yer. 582, where it is settled that a deed of gift of slaves, to take effect after the death of the donor is valid. But no case has been, or it is believed, can be shown where a remainder in a personal chattel, to take effect after the determination of a life interest, has been held good, when been created by parol, and without deed, will, or other writing. But it is argued, that upon principle this can be done, that as at common law, the payment of the price of a personal chattel, upon a contract of purchase and without delivery, vests in the vendee the property in such chattel; why will not the same consequence attend a remainder, when that is the subject of purchase and payment? The difference is founded upon the nature of a remainder itself, which in the case of a chattel is not a present title to the

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thing sold, but a right to its future enjoyment after the determination of a life estate interest, which has been carved out of it. Chancellor Kent in his Commentaries, 2 vol. 468, (2d ed.) says, "the thing sold must have an actual or potential existence, and be capable of delivery, otherwise it is not strictly a contract of sale, but a special or executory agreement." A remainder in a chattel is not a thing so existing as to be capable of delivery.

But if the argument in question were even more plausible than it is, still as at common law limitations in remainder of chattels, by will or deed, met with a slow if not reluctant sanction from the courts, and have never been carried further, there is no ground of either policy or power to tempt or warrant this court, in now giving effect to a mere parol creation of them. We think, therefore, that there is no error in the charge of the court to the jury upon the first point.

2d. As to the construction of the act of 1754, "it has been constantly held, that when possession is delivered at the time a gift or sale of a slave is made, it is good as between the parties and vests a title without a deed." Such is the language of this court in the case of *Davis vs. Mitchell*, 5 Yer. 282. Numerous decisions made in North Carolina from the time almost of the passing of the act to the present day, sustain the same principle, and this too has been the unvarying tenor of judicial construction upon the act within our own state. It cannot now be departed from. To do so now would be productive of immense mischief and place in great danger the titles of thousands to this species of property. But enlightened judges, both in North Carolina and Tennessee, have in recent cases expressed their surprise and regret that the courts of an earlier period had not felt themselves constrained to adhere to the literal requirements of the statute. See 2 Dev. 326, 329, 332; and 8 Yer. Rep. 384-5. Virginia and Kentucky more wisely, it is believed, enforced the literal provisions of the act of the former state of 1758, similar in its terms, if not identical with the act of 1784. See 1 Wash. Rep. 139: 1 Marsh. 163. The ground upon which the courts in North Carolina

and Tennessee, in their departure from the statute placed themselves, was that a delivery of the slave at the time of the sale or gift, being a public and notorious act, evidencing a change of ownership, made unnecessary the bill of sale required by the statutes; and now we are asked, in as much as former courts have by judicial construction removed one barrier set up against frauds in this species of property by the statute, to remove that other barrier, which the courts themselves set up as a substitute for it. Thinking as we do with regard to the act of 1784, and the decisions upon it, we have no power to do so, and even if we had, we have no inclination on grounds of public policy to do so, but would content ourselves with saying, in the language of the Baron's of England, on an early occasion, "*nolumus mutari.*" Let the judgment be affirmed.

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Den
v
Webster

Judgment affirmed.

DEN, *lessee vs.* WEBSTER.

Where the relation of vendor and vendee, and not that of landlord and tenant exists, notice to quit previous to commencing an action of ejectment is not necessary.

F. B. Fogg, for plaintiff in error.

R. J. Meigs, for defendant.

REESE, J. delivered the opinion of the court.

The plaintiff in error took possession of the land in question, under a contract of purchase with the lessors of the plaintiff. No notice to quit was given previously to the commencement of the action, and the only question in the case is, whether such notice be necessary. The right to such notice is founded upon the relation of landlord and tenant, but does not exist when the relation between the parties is that of vendor and vendee, in which case the vendee can protect his possession, and obtains the legal title by the aid of a

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court of chancery, if his conduct and his contract be such as to entitle him to it. But it is settled, that when sued in ejectment by the vendor, he cannot claim to be served with a notice to quit. See 7 Cowen, 747, and the cases there referred to and reviewed. Let the judgment be affirmed.

Judgment affirmed.

HILL vs. CHILDRESS.

A parent is not bound to employ counsel to defend the suits of his minor children.

An express contract is necessary to enable an attorney to recover compensation from a father for services rendered his minor child, in defending him upon a charge of murder.

The law never implies a promise to pay, unless the consideration has passed to the person sought to be charged, or to some other person for whom he is bound by law to provide.

An express promise to pay need not, however, be proved by direct and positive testimony, it may be inferred from circumstances; as where an attorney appears for a minor, and the father is present, aiding, assisting, and consulting with the attorney in conducting the defence, in the absence of proof to the contrary, a jury would be warranted in finding that the attorney had been retained by the father.

Where one man is bound by express contract to pay for services rendered, the law, in general, never imposes the same obligation on another by implication.

E. H. Ewing, for plaintiff in error.

Charles Scott, for plaintiff.

TURLEY, J. delivered the opinion of the court.

This is an action brought by the defendant in error to recover compensation for services rendered as an attorney to the son of the plaintiff in error, in defending him on a charge of murder. The facts of the case, as shown by the bill of exceptions are these: John Hill, the father, employed Thos.

H. Fletcher and Wm. Thompson, to conduct the defence of his son, to each of whom he paid \$500, and complained of the amount. Marcus Hill, a son of John Hill, and brother of the prisoner, employed George C. Childress to assist in conducting the defence—which he did. There is no proof whatever, showing or tending to show that John Hill participated in the contract, but on the contrary, the testimony of Marcus Hill states expressly that it was done against his consent. Upon these facts the court charged the jury, that if Thomas Hill, the person charged with the offence were a minor, and a son of the plaintiff in error, it would be his duty and he would be bound in law to furnish him necessary aid and counsel in his defence, and that if they believed the services of Mr. Childress were necessary and important to the defence and the making it appear that he was innocent, then an implied promise would arise upon which the plaintiff in error could be charged, although he had employed other counsel who were fully able to make the defence, and did not desire the employment of Childress.

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This charge, it is contended, is erroneous, and we think correctly; because, 1st. We do not think that a parent is bound to employ attorneys to defend the suits of his infant children, he being by law only responsible for necessities furnished them, among which the services of an attorney cannot be ranked, and therefore an express contract is necessary in order to enable an attorney to recover compensation from a father for services rendered his infant child, as the law never implies a promise to pay, unless the consideration has passed to the person sought to be charged, or to some other person, for whom he is bound by law to provide.

It is certainly true, that the express promise need not be proven by direct and positive testimony, but may be inferred from the circumstances of the case, as if an attorney appears for the infant son of a father, and he knows of it, and is present, aiding and assisting, and consulting with the attorney in conducting the defence, in the absence of proof to the contrary, a jury would be well warranted in finding that the attorney had been retained by express contract. But where the law implies a contract, there is no proof necessary but of the

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proof of an implication involves an absurdity, as it can only arise in the absence of an express agreement to do that which the law says ought *ex equo et bono*, to be done.

2d. The charge is erroneous, because it is based upon a supposititious state of facts, which do not exist, to wit: that the defendant in error was not retained by express contract, when the proof shows most clearly and conclusively that he was so retained by Marcus Hill and not by the plaintiff in error. Where one man is bound by express contract to pay for services rendered, the law in general never imposes the same obligation on another by implication. As to the question whether Marcus Hill acted as the agent of the plaintiff in error, when he retained the defendant, it is unnecessary to remark, as the charge is erroneous, and as there is no proof showing the agency, but directly the contrary. The case will therefore be reversed and remanded for a new trial.

Judgment reversed.

BLACK *et al.* vs. CRAIN.

A party to a suit who has given B as his surety for the costs, cannot by taking the paupers oath, have B discharged or released, for the purpose of examining him as a witness.

M. Taul, for plaintiff in error.

W. E. Anderson, for defendant.

GREEN, J. delivered the opinion of the court.

In this case, after the jury were sworn, the defendant in error, who was the plaintiff below, made affidavit that the wife of William Crain, who was plaintiff's security for the prosecution of the suit, was a material witness for him, and that owing to his poverty he was not able to give other security. Upon this affidavit a motion was made to release the security, Wm. Crain, which was done. Rachael Crain, the wife of

said security, was then offered as a witness for the plaintiff, to whose competency the defendants objected, but the court overruled the objection and permitted the witness to be examined. The jury rendered a verdict for the plaintiff, whereupon the defendants moved for a new trial which was refused, and judgment was rendered for the plaintiff, from which this appeal is prosecuted. We have no doubt the court erred in releasing the surety and permitting his wife to be examined as a witness. Costs had already been incurred for which the security was liable upon his bond if the plaintiff should fail in the suit. The court certainly had no power to release him from that obligation without substituting others, and leave the defendant and officers of the court without indemnity.

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Craim

This is not the description of case in which a party is permitted to prosecute a suit as a pauper, without giving security. Here he had actually given the security required by law, and he asked to have that security released and that he should be excused from giving other security, on the grounds that he was poor and unable to do so. If this were tolerated, it is easy to see that whenever the plaintiff finds the case is likely to be decided against him, he has nothing to do but to make affidavit that he wants his security for a witness and that he is unable to give other security, and he gets him released "from all responsibility." If he is once released, it makes no difference whether he be examined then or not, he cannot be bound again. Such a procedure is contrary to principle and is unsupported by the practice of the country. It is unnecessary for the court to decide whether a security can be released in any case, even where sufficient additional security is taken, and be a competent witness. It is not easy to see how his obligation or his bond for the costs that have already accrued can be discharged by the order of the court releasing him.*

Reverse the judgment and remand the cause to the court from whence it came for another trial to be had therein.

Judgment reversed.

*The court subsequently decided, in the case of *Craighead vs. The Bank of the State of Tennessee*, that the courts had the power to release or discharge a security for the costs, when it was necessary to examine him as a witness, provided other good security for the costs were given.—*Reporter*.

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v
Nixon

DEN, *lessee* vs. NIXON *et al.*

By the provisions of the act of 1824, c 22, § 6, a person who intends entering vacant land in the occupation of another, must give to the latter thirty days notice of his intention, and if such notice is not given, the entry and grant is declared void: Held, that a grant without such notice being given, covering more land than is occupied or cultivated by another, is not void in toto, but is only void for such part as is actually occupied and cultivated by the latter.

F. B. Fogg, for plaintiff in error.

R. J. Meigs, for defendant.

REESE, J., delivered the opinion of the court.

The 6th section of the act of 1824, c 22, provides, "that it shall not be lawful for any person to enter any land on which another resides, or which is cultivated by another, until such person shall have given in writing at least thirty days previous notice to the person residing on or cultivating said land, of his intention to enter the same; and any entry made or grant obtained contrary to the provisions of this section, shall be utterly void in law and equity."

The question raised upon the record before us is, whether the section above quoted, renders void an entry and grant so far only as they may effect the land actually resided upon or cultivated by another, or whether the entire grant and entry be void.

In 1823, offices were opened in every county north and east of the congressional reservation line for the appropriation of land remaining vacant. The leading object of the legislature seems to have been to induce persons to enter all the vacant lands, for the price was fixed at the small sum of twelve and a half cents per acre. For as the principle of taxation then stood, land of this inferior value would yield as large a revenue to the State as land of any other description. Another object seems to have been to protect occupants of land in a priority of entry, so as to secure to them their improvements. Both the objects could be obtained by considering the act of 1824 in question, to make void the entry and grant so far only

ast hey effected the actual possession of the improver; but to make them void entirely would be calculated to defeat the appropriation of the vacant land in the State; for in thousands of instances, no doubt, the owners of land already granted, had encroached upon and cultivated beyond the limits of their boundary, the vacant land of the State, sometimes intentionally and sometimes without being aware of it. To have made the grant of the adjoining appropriator of vacant land, who may have called for the lines of such owners entirely void because, unintentionally perhaps, including a few roods or a few acres of cultivated land, would have been defeating the main policy of the legislature in disposing of the vacant land, because few could safely enter it. Again, the section in question requires notice only when the land cultivated or resided on is about to be entered; no notice therefore is necessary when the entry is made in very *juxta position* with the possession of the improver. He is not by that section protected beyond his actual possession. Why then should the grant be void further than is necessary to protect such actual possession. Again, in 1825, and before the entries in this case were made, which was in 1826, the legislature provided, c 64, "that it should be lawful for any person to enter any vacant and unappropriated land, &c." paying one cent per acre, &c. and that from 25 to 640 acres might be entered. As no provision is made for the exemption of cultivated land from being entered by that act, it might be argued with some force, that as the improver of vacant land would not pay for it twelve and a half cents to the State, when the price was reduced to one cent per acre, his right of entry as to the cultivated land was on the same footing with that of others. But waiving this consideration, we are of opinion, that the objects and policy of the acts of 1823-4, are better attained by declaring the grant and entry in a case like that before us, void *protanto* and not for the whole.

If this opinion needed to be fortified by the authority of precedent, it is very strongly done in the cases of *Danforth vs. Wear*, 9 Wheat. 673, and *Patterson vs. Jenks*, 2 Peters' 236, where grants were held to be void in part and good in part, where portions of them lay within the Indian boundary,

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as forcible in their terms as that under consideration. Let the judgment be reversed and a new trial be had, when the law will be charged in conformity to this opinion.

Judgment reversed.

GOODWIN vs. FLOYD.

Where slaves are sold at execution sale, no bill of sale proved and registered is necessary as against creditors or purchasers.

Where a party agrees with the plaintiff in the execution, that he will purchase the slaves levied on, when sold by the sheriff, but it was also agreed that he was not to pay the price bid to the plaintiff, unless the title was good: Held, that this contract did not vitiate the sale.

M. Taul, for plaintiff in error.

J. Campbell, for defendant.

TURLEY, J. delivered the opinion of the court.

The points to be determined by this court depend upon the correctness or incorrectness of the charge given to the jury by the court below, and are 1st. Whether the plaintiffs, William S. and Elisha Floyd, being purchasers of the property in dispute under execution sale, are bound to produce as evidence of their title, a bill of sale from the constable who sold it? We think not, and without entering into an argument to show the correctness of this opinion, are satisfied with referring to this same case, reported in 8 Yer. Rep. 434, and reaffirming the doctrine there laid down on this point.

2. Whether if the defendant, Goodwin, purchased the property by a contract with the plaintiff in the execution under which he claims, that he was not to pay the price bid for it, unless he was able to hold it by law, would vitiate the sale?

It is said that it would, because there can be no sale without a price paid or to be paid. This is unquestionably the law, but as we think, does not apply to this case, because

there was no sale from the plaintiff in the execution to Goodwin, but a sale from the defendant in the execution made by the sheriff whom the law constitutes his agent for that purpose, and the consideration paid therefor is a satisfaction of the judgment against him to the amount bid for the property, and therefore there is a sufficient consideration to transfer the property, if there be nothing else to prevent it.

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v
Carter

There is nothing in the common law or any of the statutes passed to prevent champerty and maintenance, which can be held as applicable to the question under consideration, and if such contracts are considered as criminal or dangerous in their tendency, the legislature must provide for them.

The judgment will be reversed and the case remanded.

Judgment reversed.

MAXEY vs. CARTER.

Where a judgment is rendered against one of two sureties, who pays the judgment: Held, upon a motion made by him against the personal representatives of his co-surety for contribution, that the act of limitations commenced running against him from the time he paid the money, and not from the time the judgment was rendered against him.

Geo. S. Yerger, for plaintiff in error.

J. Campbell, for defendant.

REESE, J. delivered the opinion of the court.

This court having determined in the case of *Marshall vs. Hudson*, 9 Yerger's Reports, 57, that the discharge of the personal representative of a decedant by the operation of the act of 1789, from his direct liability to a creditor, does not protect him against his collateral liability to a surety or co-surety, when such surety or co-surety, by paying the debt of the decedent, has created between himself and the personal representative the relation of creditor and debtor, within the meaning of that act; it leaves nothing in this case to be determined, but the question whether the executors of Maxey are

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protected by the same statute against this new liability. Two years had not elapsed between the time when Carter paid the money upon the judgment, and the time of making the motion in this case, but more than two years had elapsed from the rendition of the judgment against Carter. And it is urged, that, as by the 3d section of the act of 1809, c 69, Carter might have made a motion against the personal representative of his co-surety, upon the mere ground that a judgment had been obtained against himself, his claim, by motion, is barred, although afterwards, and within two years of the time of his motion, he pays the judgment. To this we answer: 1st. It is not very clear in this case, that Carter could upon the mere ground of the rendition of a judgment against himself, have obtained, on motion, a judgment for contribution against the representative of Maxey, for that representative along with himself and the principal debtor had been sued, and when the judgment was obtained against the two last, the former had obtained a judgment in his favor; and it well might be contended that the case, although within the words, is not within the object and meaning of the 3d section of the act of 1809, which it is believed was intended to apply to the case where a part only of the co-sureties had been sued in the action, and to give them a remedy over for contribution against the co-sureties not sued. But waiving this consideration, we answer, the section itself gives to the co-surety his remedy by motion, as well on the ground that he has paid the judgment, as on the mere ground that a judgment has been rendered against himself; and to contend that, if for two years he shall wait to see if the principal will not pay, or his co-surety contribute, and he shall then pay the judgment, that he may, contrary to the express provisions of the statute, lose by operation of the act of limitation of 1789, his remedy by motion, because he did not avail himself of his motion, upon the mere ground of the judgment, is to wage war against the provisions of the act of 1809 itself. The section says that if you do not make your motion upon this latter ground, you may upon the former; but the argument says, if you do move upon the ground of the payment, you shall be barred because you did not move upon the ground of the

judgment. It may be doubted whether the act of 1809, so far as it gives the extraordinary remedy of a motion against a co-surety upon the mere ground of the judgment, has the effect of enacting by the mere force of said judgment the relation of creditor and debtor, within the meaning of the act of 1789—After the judgment, as well as before, the relation is probably that of co-suretyship only; and after the rendition of the judgment and before payment, the co-surety could not, it is believed, by force of the act of 1809, maintain his action at common law. In the case of *Marshall vs. Hudson*, it was not necessary for the court to assert, and it is not directly asserted, that the judgment itself creates the relation of creditor and debtor between the surety and the personal representative of the principal, within the meaning of the act of 1789, and the correctness of the intimation of such an opinion in that case may well be doubted. In addition to the other grounds taken in this case, it may be stated that the principles determined in the case of *Scott vs. Lanham*, 8 Yerger's Reports, 423, seem to be decisive of the question before us. Let the judgment be affirmed,

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Alderson

Judgment affirmed.

THE STATE vs. ALDERSON.

Where the *venire facias* directs the sheriff to summon "good and lawful men," to serve as jurors, it is sufficient, without specifying the particular qualifications necessary to constitute them "good and lawful" jurors.

In proceedings in superior courts, it is not necessary that the record should show the qualifications of the jurors.

T. H. Cahal, for plaintiff in error.

Geo. S. Yerger, Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The only question raised at the bar in this case, is, that the record does not show that the grand jurors were good and

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lawful men of Maury county. The *venire facias* is directed to the sheriff of Maury county, and commands him to summon the following "good and lawful men" to serve as jurors at the next county court for Maury county. It is insisted, that it should have commanded, in express words, to summon citizens of Maury county; for that he could have summoned good and lawful men who were not of that county. We do not think the argument sound. What constitutes an individual a lawful man to serve as a grand juror in Maury county? He must be a citizen of that county, and a householder or freeholder. If he is not a citizen, he is not a lawful man any more than if he is not a householder. There is as much reason, therefore, for insisting that the latter qualification should also have been specified in the *venire facias*, as the former. But the word "lawful" includes every thing that the law requires in order to constitute the party a competent juror, and as citizenship in Maury county is one of his legal qualifications, the requisition to summon "lawful men" is a requisition to summon citizens of that county. But if this were not so, it is settled in the case of *Cornwell vs. The State*, Martin and Yerger's Reports, 149, that it is not necessary that the qualifications of jurors should appear in the case of proceedings in the superior courts. 1 Chit. Crim. Law, 333.

The judgment must be reversed and the cause remanded to the Maury circuit court to be proceeded in, &c.

Judgment reversed.

SIMPSON *et al.* vs. THE STATE.NASHVILLE,
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v
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Where, by the terms of their charter, the proprietors of a turnpike road forfeited their right to receive toll if they permitted the road to be out of repair, they are also liable in such case to be proceeded against by an indictment for a nuisance.

J. Campbell, for the plaintiff in error.

Geo. S. Yerger, Attorney General, for the State.

REESE, J. delivered the opinion of the court.

The defendants, who were the proprietors of a turnpike road, were presented for a nuisance in not keeping the road in repair. They were convicted and moved in arrest of judgment. The judgment of the circuit court having been rendered against them, an appeal in error was prosecuted to this court. It is insisted for the defendants, that they are not liable to an indictment, but only forfeit their right to receive toll when the road is out of repair. By the 2d section of the charter (acts 1831, c 34, private acts,) the proprietors are required to keep their road "clear of stumps, grubs, roots, trees, rocks, runners, or other obstructions," and by the act of 1831, c 42, § 1, and the act of 1835, c 66, § 1, "the proprietors of turnpike roads and toll bridges, or the keepers thereof, or either of them, shall be subject to be punished for permitting their roads or bridges to remain out of repair, in the same manner, and under the same rules, regulations and restrictions that overseers of public roads are subject to, according to the laws of the State."

It is insisted for the defendants that they are not liable to an indictment under the acts just quoted, for permitting their road to be out of order, because, by the terms of their charter, certain commissioners were appointed, whose duty it was to view and lay off the road in the first instance, and when finished, to inspect it once within every two months, and if they should deem it out of repair, to throw open the gates, to the end that the public, during the time it might so remain out of repair, should have the use of the road free from tollage. This, it is contended, is the only penalty to which they can

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be subjected; or, in other words, that the State having by the charter itself subjected the proprietors to the loss of tollage, with a view to the enforcement of their duty in keeping the road in good repair, it was not competent to add further or cumulative penalties. And why not? Are the proprietors subjected by the provisions of the acts of 1831, c 42, § 1, and 1835, c 66, § 1, to any new duties or heavier burthens? Are their rights under their charter divested, or their privileges curtailed? Surely not. If they perform the duty imposed upon them by their charter, and keep their road in repair, they will escape the animadversion alike of the commissioners in throwing open their gates, and of the courts in subjecting them to fines. But if they omit this duty, and suffer their road to become a public nuisance, shall they be heard to say to the State, throw open our gates by means of your commissioners, if you choose, but we have bargained with you in our charter, that we shall not be proceeded against as for a nuisance? Is it the meaning of the charter that they may suffer the road to remain out of repair if no toll be received? Surely not. For then it might suit them to suffer the road to continue in bad condition, and the gate to continue open during half of the year, when there might be but little traveling upon it, and during the other and more profitable half, to put it in repair and close the gate. In fact, there can be little doubt that experience manifested this scheme of enforcing the duty of proprietors of roads, by the control of commissioners to be utterly inefficient and nugatory, not because if the gates, for their default, had been opened, such a measure would have been wanting in energy, but because the commissioners were found to want the vigilance, the firmness or the integrity to prompt them to the adoption of the measure. If then these petty agents of the public shall refuse or omit to do their duty, or shall die or remove, shall the community, who have surrendered their duty of keeping the road in repair to the proprietors, be compelled not only to travel over bad roads, but be subjected also to tollage.

As to the form of the indictment, we think that in alleging the offence, it substantially pursues the terms of the charter;

And we also think that the liability of the proprietors is well enough stated. Let the judgment be affirmed.

Judgment affirmed.

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Bryant

THE STATE vs. BRYANT.

Pleas in abatement are *stricti juris*, and are not favored in law.

A plea in abatement, that one of the jurors who found the presentment was neither a freeholder nor a householder of the county in which the presentment is found, is bad.

A citizen of one county, who owns freehold lands in another county, or who is the owner of an occupant right to lands situated in another county, is a good and lawful juror of the county in which he resides.

The defendant was indicted in the circuit court of Giles county, for gaining. He pleaded in abatement that one of the grand jurors who returned the presentment was neither a freeholder nor a householder of Giles. The solicitor in behalf of the state replied that he was the owner of land by entry, but on which a grant had not issued in the county of Giles. To this replication there was a demurrer. The circuit court overruled the demurrer, and rendered a judgment for the defendant.

Geo. S. Yerger, Attorney General, for the State.

J. Campbell, for defendant.

TURLEY, J. delivered the opinion of the court.

The question for determination is, whether a plea in abatement, alleging that one of the grand jurors who returned the presentment, was neither a freeholder nor householder of the county, is a good plea. Pleas in abatement are construed with great strictness, and are not favored in law. To this plea there are two objections, 1st, That it is not necessary that a juror should be a freeholder of the county, it being sufficient if he be a freeholder of the state. 2d. That he

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The act of 1779, c 6, § 4, provides, "that if the county court shall fail or neglect to nominate freeholders to serve as jurors, or the persons nominated shall fail to attend, it shall and may be lawful for such court to order and direct the sheriff to summon other freeholders of the bystanders to serve as jurors." This is the first statute concerning the qualification of jurors, which makes it necessary that they be freeholders, but does not confine it to the lands of the county. The act of 1809, c 119, § 2, makes "every male citizen, being a householder, and arrived at the age of twenty-one years, a legal and qualified grand or petit juror in all cases, except those in which the venue has been changed." The act of 1825, c 82, § 2, provides, that in "all cases where a change of venue may be had, when a jury of freeholders cannot be had to try the same, a jury of householders shall be held and deemed competent to try such causes." The act of 1835, c 6, § 8, provides "that the jurors summoned by the order of the county court to attend the circuit courts, shall be freeholders, owners of occupancy's, or householders, and twenty-one years of age."

These are all the statutes, regulating the general qualifications of jurors, from which it is seen, that the freehold or occupancy qualification is not confined to the county. And this court has no disposition, if it had the power, so to limit it.

The plea in abatement then is bad for both reasons assigned, for although the juror may not have been a freeholder of the county of Lincoln, yet, *non constat*, that he was not a freeholder or the owner of an occupancy in the State, either of which would constitute him a legal and qualified juror.

The court below erred then, in overruling the demurrer to the plea, and the judgment must be reversed and the case be remanded for further proceedings.

Judgment reversed.

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JARNAGIN vs. THE STATE.

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Where counsel are employed to assist the solicitor in a state prosecution, it is not error for the circuit court to permit such assistant counsel to conclude the argument on the part of the government.

Where a jury retired to a room of the building wherein the court was held, to consider of the verdict, without being accompanied by an officer, and it did not appear that they improperly separated, or that there had been any communication with them: Held, that a new trial ought not to be granted.

The indictment charged that the defendant did unlawfully, &c. "thrust," "stab," &c. &c.: Held, this was sufficient, without describing the injury by the term "cut" or "wound."

The defendant and others were indicted in the circuit court of Cannon county, for unlawfully and maliciously stabbing John N. Tucker. The description of the offence in the indictment is as follows: "they the said Allen Jarnagin, Needham Jarnagin, and Kinchen Jarnagin, late of the county aforesaid, yeomen, on the fourteenth day of October, eighteen hundred and thirty-six, with force and arms, in the county aforesaid, in and upon John N. Tucker, then and there being, feloniously, unlawfully, and maliciously, did make an assault, and the said Allen Jarnagin, Needham Jarnagin and Kinchen Jarnagin, with a certain knife of the value of one dollar, which they the said, &c., in their right hands then and there had and held, the said John N. Tucker, in and upon the left arm and right hip of him, the said John N. Tucker, then and there feloniously, unlawfully, and maliciously did thrust and stab contrary, &c." The defendant was convicted, and prosecuted a writ of error to this court.

One of the grounds of error assigned was, that the description of the offence in the indictment was insufficient, that the terms, "thrust and stab" were improper, and that the indictment should describe the offence by the term "cut" or "wound," so as to show that the skin was broken.

There were other points in the cause, the facts of which are stated in the opinion of the court.

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Brien, for plaintiff in error.

Geo. S. Yerger, Attorney General for the State.

REESE, J. delivered the opinion of the court.

The prisoner was indicted and convicted in the circuit court of Cannon county, under the act of 1829, c 23, § 55, for a felony, in unlawfully and maliciously stabbing one John N. Tucker. A motion for a new trial was made by the prisoner, which was overruled, and he was adjudged to confinement in the penitentiary, and he has prosecuted his appeal to this court.

Upon the record or in the argument it is assigned for error, 1st, that one of the jury was not a freeholder or householder in the county of the trial. The juror had in the usual manner verified his qualifications, and was accepted by the prisoner. After the jury had been all sworn, but before any evidence had been heard by them, the record shows that the attorney for the state suggested to the court the want of qualification on the part of the juror, and moved that another should be substituted, to which the prisoner by his counsel objected. Clearly, therefore, he cannot urge as error the sitting of that juror upon his trial.

2d. On the application of the attorney for the state, a gentleman who appeared in the cause as assistant counsel was permitted by the court to conclude the argument on behalf of the government. The regulation of that matter properly belonged to the circuit court. The discretion which the judge of that court had, we have no reason to suppose was indiscreetly exercised, and its exercise in the mode mentioned was, we take no ground of error before us.

3d. It is said, that the jury retired to consider of their verdict into a room of the building in which the court was held, unaccompanied by an officer. It does not appear that an officer was necessary, that the jury improperly separated, or that any communication of any sort was had with them by persons not of their body—so that there is no error in this.

4th. It is assigned in argument for error, that the indict-

ment describing the offence or injury done to the person of Tucker, by the term "stab," as used in the statute, and does not describe the injury inflicted by the term "cut" or "wound," so as to show that the skin was broken or penetrated by the weapon. But we think that the word "stab," by its own proper force and meaning, imports a breaking and penetration of the skin, as distinctly as would the word "cut," and more distinctly than would the word "wound," and is peculiarly, if not exclusively, appropriated to describe the injury inflicted by thrusting with a sharp pointed instrument. Thus in McDermott's case, Russ. & Ry. 356, where the prisoner was indicted under 43 George III, for sticking and cutting with a bayonet, and the surgeon stated that the wound was a punctured triangular one, the prisoner being convicted, the judges, in a case reserved, were of opinion, that as the statute used the words in the alternative, "stab" or "cut," so as to distinguish between them, the distinction must be attended to in the indictment, and they held the conviction wrong. Here the error was, that the word "stab," appropriated to describe the character of the wound in question, was not used in the indictment, rather than the word cut, which was used. In murder the practice is, for reasons obviously connected with the mortal character of the injury, to describe the nature and extent of the wound. But under our statute of stabbing no such practice is necessary, or indeed perhaps proper. Let the judgment be affirmed.

Judgment affirmed.

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Where a jury in a capital case cannot agree upon a verdict, the court has not the power, without the consent of the prisoner, to discharge them.

Where a jury in such a case is improperly or illegally discharged, it operates as an acquittal.

The courts have power to discharge juries in criminal causes, only in cases of manifest necessity.

The cases of necessity which will authorise a court to discharge a jury, are of three classes: 1st. Where the court is compelled to adjourn before the jury agree. 2d. Where the prisoner, by his own conduct, places it out of the power of the jury to investigate his case correctly, or where, by the visitation of providence, he is prevented from attending to his trial. 3d. Where there is no possibility for the jury to agree and return a verdict.

Sickness or insanity of one or more jurors, exhaustion before they can agree, or the absconding of one or more jurors, constitute cases of necessity which will authorise the court to discharge the jury.

But where the jury cannot agree, because their minds cannot come to the same conclusion from the evidence, it is not such a case of necessity as will authorise their discharge.

The jury in this case were empannelled on Thursday evening at 2 o'clock; they came in once or twice during the same evening, and declared they could not agree; they were however kept together all night by the court, and at 9 o'clock the next morning, upon their declaring they could not agree, the court discharged them. The court continued its session until the next day, (Saturday:) Held, that this was not such a case of necessity as authorised the court to discharge them.

The defendant, a slave, was indicted in the circuit court of Robertson county, for the murder of Nancy Newton. She pleaded "not guilty." At the May term, 1837, of said court, the cause was called for trial, and on Wednesday, the 3d May, 1837, a jury was empannelled to try it. The evidence and arguments of counsel were closed on the succeeding Friday, and at about 2 o'clock, P. M. of that day, having received the charge of the court, the jury retired to consider of their verdict. After they were absent about half an hour, they came into court and informed the judge that they could not agree, whereupon the court charged them that they ought to endeavor to agree, and to retire again. The jury then re-

tired to their room, and in about an hour and a half again came into court, and stated that they never could agree. The court then told them of the importance and necessity of their agreeing if they possibly could, and to retire again and endeavor faithfully to do so; that if it were wholly impossible for them ever to agree, the court possessed the power of discharging them, and would, if necessary do so. The jury still not agreeing that day, the court had them confined together that night, and next morning, (being Friday,) about half past nine the jury again came into court and told the court it was impossible for them ever to agree, whereupon, the court being satisfied that the jury could not agree, discharged them. The counsel for the defendant, before the jury were discharged, remarked to the court that he did not feel authorised to consent to their discharge, and that the law must be pursued by the court. The court continued its session until the next day, (Saturday,) and then adjourned. Previous, however, to its adjournment, the counsel for the prisoner on Saturday morning moved the court to finally discharge the prisoner upon the ground that the court had no authority, under the circumstances, to discharge the jury, and that it operated as an acquittal. The court refused to discharge her. At a subsequent term of the court the prisoner was again put upon her trial, and was convicted of murder, and judgment of death pronounced. From this judgment, a writ of error was prosecuted to this court.

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W. Thompson, for plaintiff in error. It is conceded that the circuit courts have a discretionary power to discharge a jury without their rendering a verdict, in case of manifest, or (as some of the judges say) of absolute necessity; and this power may be exercised under the above restriction even in trials for capital offences.

That the court can discharge a jury in criminal causes without their rendering a verdict, in cases of manifest necessity alone, see Foster's Reports, the case of the Kinlocks: Roscoe on Criminal Evidence, 177, and note: 2 Cain's Reports, 204: 18 Johnson's Rep. 187, *The People vs. Goodwin*: 4 Wash. C. C. Rep. 402, *United States vs. Haskell*:

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Commonwealth vs. Clue: 9 Wheaton, *United States vs. Perez*, page 579: Martin and Yerger's Rep. 278, *The State vs. Waterhouse*.

In the cases cited above, in 6 Serg. and Rawle and 3 Rawle, the supreme court of Pennsylvania decided that inability of the jury to agree is no ground for discharging them.

Geo. S. Yerger, Attorney General, contended that the discharge of the jury under the circumstances, did not operate as an acquittal of the prisoner. He cited and commented on *Kinlock's* case, Foster's Crown Law, 22: *Waterhouse vs. The State*, Martin and Yerger's Rep. 278: 9 Mass. Rep. 494: *People vs. Goodwin*, 18 John. Rep. 187: *People vs. Olcott*, 2 John. Cases, 275, 301: *United States vs. Perez*, 9 Wheaton's Rep. 579: *People vs. Green*, 13 Wendall's Rep. 55: *Commonwealth vs. Clue*, 3 Rawls' Rep. 498: *Commonwealth vs. Cook*, 6 Binny's Rep. 580.

TURLEY, J. delivered the opinion of the court.

The right of trial by jury has always been regarded by the English and American jurists as one of the most sacred principles of the law, one to which the citizen is more deeply indebted than to any other for that security to life, liberty and property guaranteed in Great Britain and the United States to an extent unknown in other countries, and the preservation of which in its purity and independence, has at all times been guarded with a most watchful and jealous eye. Therefore it is, that an attempt whenever made by the courts to interfere with the privileges of a jury, and endanger their independence, and the consequent security of the subject, has at all times been promptly resisted, and though, occasionally, in times of great political excitement in England, it may have succeeded for the day, yet to the honor of the legal profession, the usurpation has always been rebuked, and the proper balance of power between the court and the jury quickly restored. It is a well understood maxim of our law, that the judges are to expound the law, and the jury to ascertain the facts, neither of which has the power to interfere with the province of the other.

The jury in their deliberations upon the facts are as independent of the court, as the judge in determining the law is of the jury; and the consequence is, that when a case has been submitted to a jury, there it must remain until it has been decided by them, or is withdrawn from their consideration, not at the will and pleasure of the court, but under circumstances justified by the law. In the case now presented for the consideration of this court, the jury returned no verdict, and the case was taken from their consideration, and they discharged against the consent of the prisoner. And the question is, whether under the circumstances, this was not an illegal exercise of power on the part of the court below, and the prisoner of consequence, entitled to her discharge? This is a question of much importance, and although it has not, perhaps been directly settled by adjudicated cases in this State, we feel much relieved in the conviction that it is well settled both by principle and authority in England, and a very respectable portion of the States of this Union. Lord Coke in his 1 Institute, 227, b, and 3 Institute, 100, lays it down as a general rule that a jury sworn and charged by the court in cases affecting life or member cannot be discharged by the court, or any other, but they ought to give their verdict. This doctrine upon the authority of Coke, was afterwards engrafted by Hawkins and Blackstone into their elementary treatise on the criminal law. And although this principle was controverted in the case of Ferras cited in Sir Thomas Raymond, 84, and in a case of larceny reported in 1 Ventress, 69, and one reported in Salkeld, 646; yet it cannot be said to have been fully examined and completely overruled, until the decision of the case of the two Kinlocks, reported in Foster from page 22 to 40, when it was considered by all the judges but one that the general rule laid down by Lord Coke had no authority to warrant it, and could not be universally binding; but, that there were exceptions to it, and in that case determined that the court had power to discharge a jury at the request of the prisoners, assisted by able counsel, and with the intent of imparting to them a privilege which they could not otherwise have enjoyed. Since that decision it has not been doubted that the courts have the power to discharge

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juries without their rendering a verdict, but only as we think in cases of manifest necessity. All the cases of exception (to the general rule as laid down by Lord Coke,) specified in the elaborate opinion of Mr. Justice Foster in the case of the Kinlocks, are cases of necessity, and there is no authority to be found in the English books which sustains the position, that a jury may be discharged in a criminal case without the consent of the prisoner, but from necessity. Such also, we think, has been the train of the decisions in the United States.

In the case of *The People vs. Goodwin*, 18 Johnson's Reports, 187, Judge Spencer, in delivering the opinion of the court, says, "Upon full consideration, I am of opinion, that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme and absolute necessity."

In the case of the *United States vs. Coolridge*, Gallison's Rep. 364, Justice Story says "that the power to discharge a jury in capital cases should only be exercised in very extraordinary and striking circumstances."

In the case of the *United States vs. Haskell and Francois*, 4 Wash. 411, Judge Washington says, "that a court is fully authorised to discharge a jury in cases of necessity in capital cases as well as misdemeanors."

In the case of the *United States vs. Perez*, 9 Wheaton, 579, Judge Story, in delivering the opinion of the court, says, "We think that in all cases the law has invested courts with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would be defeated; but that the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes, and in capital cases especially the court should be extremely careful how they interfere with any of the chances of life in favor of the prisoner."

In the case of *The People vs. Barrett*, Livingston, Judge, says, "Without denying the right of courts to withdraw a juror, in criminal cases, and put the defendant on his trial a sec-

ond time, it is evident this power should not be lightly used, but confined as much as may be to cases of urgent necessity, when by the act of God, or by some sudden and unforeseen accident it is impossible to proceed without manifest injustice to the public or to the defendant himself."

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These decisions made by the first tribunals of the country, completely sustain the position that the power to discharge a jury, without a verdict, is not the exercise of an arbitrary discretion, but an extremely delicate duty, only to be performed in cases of urgent necessity.

This brings us to the examination of what constitutes this necessity. We are of opinion that the causes which create this necessity may be classed under three heads. 1st. Where the court is compelled by law to be adjourned before the jury can agree upon a verdict. 2d. Where the prisoner, by his own misconduct, places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the State, or is himself, by the visitation of providence, prevented from being able to attend to his trial; and 3d. Where there is no possibility for the jury to agree upon and return a verdict.

It is upon the last of these propositions that the question in the case under consideration arises. The jury were empannelled on Thursday evening, at 2 o'clock, and were discharged at 9 o'clock on Friday morning, because they could not agree upon a verdict, the court continuing its session until sometime on the Saturday following. Now, the question is, was this such a case of necessity as justified the court in discharging the jury? A jury may not be able to agree upon a verdict for many reasons, such as sickness or insanity of one or more of the jurors, exhaustion of the jury before they have been able to come to a decision of the case, the absconding of one of the jurors, without the consent of the court. These are cases put in the books, and with others of like character, constitute what we will distinguish as cases of physical impossibility. A jury may also not be able to agree because their minds cannot come to the same conclusion from the facts submitted to their consideration. This, we would consider as a case of moral impossibility; and we are called upon to say whether it constitutes a

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necessity for the discharge of a jury before the time arrives when the court must adjourn. We think it does not. In the case of the Kinlocks, Mr. Justice Foster enumerates many cases in which from necessity a jury may be discharged, and never once intimates that it may be done merely because they could not bring their minds to concur in the same opinion. It cannot be possible that he should have neglected doing so if in his opinion it had constituted a case of necessity, for it would be so palpable a course for the exercise of this delicate power, and would be of such frequent occurrence, that no judge could overlook it in enumerating the causes for which a jury might be discharged from rendering a verdict. Indeed, it is almost manifest that Mr. Foster was of opinion that it did not constitute a case of necessity, for in commenting upon Mansel's case, he says, "the truth of the case was no more than this, the jury were not agreed on any verdict at all, and therefore nothing remained to be done by the court but to send them back and keep them together until they should agree to such a verdict as the court could have received and recorded.

There is no English decision then sustaining the position that the court has the power to discharge a jury because they cannot agree upon a verdict, unless there be some physical impossibility connected with it, and so we think is the spirit of all the American authorities when properly understood.

In the cases of the *Commonwealth vs. Cook and others*, 6 Serg. and Rawle, 577, and the *Commonwealth vs. Clue*, 3 Rawle's Reports, the supreme court of Pennsylvania have decided that an inability of the jury to agree is no ground for discharging them, and in Haskell and Francois' case, 4th Washington Rep. 411, Judge Washington says he entirely concurs with the supreme court of Pennsylvania, in the opinion in Cook's case, 6 Serg. and Rawl, that the court ought not to discharge a jury merely upon the ground that they say they cannot agree, however positive the declaration may be. These cases are of very high authority, and we consider the reasoning satisfactory.

But it is said that they are contradicted by the decisions of the supreme court of the United States and other States of the Union. We will briefly examine the cases referred to

by the attorney general for the support of this assertion. The first case is that of the *United States vs. Perez*, 9 Wheaton, 579. The facts of this case as stated in Wheeler's Criminal Cases are very strong, and if the supreme court of the United States had determined that they constituted a case of necessity, there would have been no way of reconciling the case with the Pennsylvania decisions. This was a case of piracy, and the jury were discharged in less than four hours; surely no one can doubt that it was a rash and hasty exercise of power on the part of the circuit court. Upon the propriety of it, the judges were divided in opinion, and the case was certified to the supreme court of the United States, when the case was determined, not upon the ground that the facts constituted a case of necessity in the opinion of the supreme court, but because, as Judge Story says, the court below had the power to order the discharge, and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the judges under their oaths of office; or in other words, the exercise of the power to discharge, being an act of discretion, it must rest with the court below, and that the supreme court will not reverse it. In our opinion, this decision does not conflict with the cases in Pennsylvania.

The next case we will examine, is that of the *Commonwealth vs. John Bowden*, 9 Mass. 494, there a jury was discharged after being out a part of a day and a whole night, and it was held by the court not to be a discharge of the prisoner—this was a case of highway robbery. The question does not appear to have been elaborately investigated, for so far as we can judge from the argument of the counsel for the prisoner, it turned upon the point of whether the court had power, under any circumstances to discharge a jury without the consent of the prisoner, for the argument was, that in a capital case the jury could not be discharged with the consent of the prisoner, nor in any criminal case, without such consent. The court say, that the strictness of the law, upon this subject has very much abated in the English courts, and that it would not be consistent with the genius of our government to use compulsory means to effect an agreement among

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jurors. So that it seems to us, that the question, as to whether a necessity for the discharge of the jury in this case existed, was never brought to the consideration of the court, and that it only can be considered as an authority in favor of the power of the court to discharge a jury in case of necessity. Moreover it may be observed, that in Massachusetts the practice continued of keeping a jury after the case had been submitted to them without refreshment, until they had agreed upon the verdict, and that the court considered it wrong to resort to such means to compel a verdict. The same remarks may be made of the case of the *People vs. Alcot*, 2 John. Cases in Error, 301. The question was, as to the power of the court to discharge a jury in criminal cases, and Judge Kent, who delivered the opinion of the court, places it upon the ground of necessity, and says, "the moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one; and that it must be a pretty clear case of an abuse of discretion to induce them to say, that the court below ought not to have discharged the jury. This was also a case of misdemeanor, and the court expressly guard against an expression of opinion, as to what would have been their decision upon the facts presented had the case been capital.

In the case of the *People vs. Godwin*, 18 John. Rep. 188, the jury was not discharged till within half an hour before the adjournment of the court; and in the opinion of the court delivered by Judge Spencer, he says, that whenever in cases of felony, a jury has deliberated so long upon a prisoner's case, as to preclude all reasonable expectation that they will agree on a verdict, without being compelled to do so from famine and exhaustion, it becomes a case of necessity and they may be discharged. And that in the present case we consider the discharge of the jury a discreet exercise of the powers of that court, either on the ground that the jury had been kept together so long as to preclude all hope of their agreeing, unless compelled by famine or exhaustion, or on the ground, that the powers of the court were to terminate

within a few minutes, and that it was morally certain, that the jury would not agree within that period, which produced an absolute necessity for discharging them. This case, then, instead of conflicting with the Pennsylvania decisions, is in our opinion, in full accordance with them. In the case of *The State vs. Waterhouse*, Mar. & Yer. Rep., the supreme court of the State of Tennessee, have determined, that in capital cases the courts have a discretionary power to discharge a jury, where they cannot agree, but they expressly negatived the idea that it may be exercised without a supervising control, for they say there are cases where a court would act very improperly in discharging a jury, but they do not pretend to specify the cases where it may be done, and where it may not. The case cannot then be considered as doing more than deciding that the discharge of the jury is not *ipso facto*, a discharge of the prisoner, but must depend upon the necessity of so doing, and that if the necessity do not exist, it is an improper exercise of power, and upon a writ of error the prisoner will be discharged. We therefore think, there is no well adjudicated case conflicting with the decision of the supreme court of Pennsylvania, because in no case referred to was the question, as to what constituted a necessity to discharge, brought to the consideration of the court, and nothing but the question, as to the power so to do, upon a fit case made out.

The reasoning of the case in Pennsylvania, we have said, is to our minds entirely satisfactory. If a moral impossibility for a jury to agree, without being attended with some physical impossibility, constitutes a case of necessity, it is manifest that the decisions of the inferior court can never be reversed. For how can the superior court know whether the jury could have agreed or not, and how long shall the inferior court be compelled to keep the jury together, before it shall be warranted in saying, that they cannot possibly agree? shall it be an hour, a day, a week, or a month?

Upon the whole, the power of discharging a jury, against the consent of the prisoner, is of such a dangerous character, that we hesitate not in saying that it should not be exercised by the courts, where the jury cannot agree on a ver-

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dict, unless they be prevented by a physical impossibility from so doing, and that when such impossibility does not exist, the jury should be kept together until such time as the court is about to adjourn, when, of necessity, they must be discharged. This is the situation of the case under consideration. There was no physical impossibility for the jury to agree, and they were discharged at least twenty-four hours before the court adjourned, which was an improper exercise of the power, on the part of the court, and the judgment must therefore be reversed and the prisoner discharged.

Judgment reversed.

THE STATE vs. HARRISON.

Where an indictment is lost, the court during the term has power to supply it by making a copy a part of the records, provided the judge of his own knowledge or recollection knows it to be a literal copy.

The entry, making a copy of a bill of indictment a part of the record, must show that the judge was satisfied from his own recollection that it was a true copy and that the original was lost.

The defendant was indicted at the January term, 1838, in the circuit court of Davidson, for a rape, alleged to have been committed on the body of Patsy Mayo. The defendant pleaded "not guilty." The cause was taken up for trial, and a jury empannelled and sworn to try it, at the same term. The bill of indictment was read to the jury, and the prisoner thereon convicted. The prisoner then filed reasons in arrest of judgment, the principal of which were, that there was no bill of indictment upon record against him.

Upon examination it appeared, that the bill of indictment was lost or mislaid during the trial, and upon diligent search for the same it could not be found.

The solicitor thereupon moved the court to make a copy of the indictment, together with the affidavits annexed, a part of the cause. The affidavits were as follows:

John Trimble, Attorney General, &c. makes oath, that

at the January term of the circuit court of Davidson county, **NASHVILLE,**
 1838, sitting at Nashville, he drew up a bill against William **December, 1837.**
 Harrison for a rape against Patsy Mayo, that the above is, **Harrison**
 as he believes, an exact *verbatim et literatim* copy of the said **v**
 original bill of indictment. He believes so because his at- **The State**
 tention was drawn to it, being the first indictment he had ever
 drawn for a rape. He distinctly remembers having drawn it
 from a form in Davis' Precedents, No. 297, and was struck
 with its simplicity and conciseness. He took the names of
 William G. Harrison and Patsy Mayo from the warrant now
 on file in court, also the date at which it is alleged to have
 been committed, and has compared the above copy with the
 form in Davis' Precedents, and the names of the parties and
 the date of said crime with the warrant, and find them cor-
 respond, and that the said original indictment was read to the
 jury which tried said cause, and was sent by him to the grand jury
 before said trial and was returned endorsed, "a true bill;"
 "Francis McGavock, Foreman," and that Henry Tucker's
 name was endorsed by me, "Henry Tucker, prosecutor," on
 said original bill.

JOHN TRIMBLE.

Sworn to in open court, 15th February, 1838.

R. B. TURNER, Clerk.

Robert B. Turner, clerk of the circuit court of Davidson
 county, maketh oath, that at the January term, 1838, of said
 court, he administered an oath to Patsy Mayo and Joseph L.
 Ryan, to go before the grand jury as witnesses in the case of
 the State of Tennessee against William G. Harrison, and
 that the names of said witnesses were endorsed on the bill
 against said Harrison, and also the fact that they were sworn
 in open court, and signed by him as clerk, &c.; also that Hen-
 ry Tucker, prosecutor, was also endorsed on said bill as pros-
 ecutor, that said bill so endorsed was returned into court by
 the grand jury endorsed, "a true bill," "Francis McGavock,
 Foreman." That on said indictment he arraigned said Wm.
 G. Harrison, and that the same was used in the progress of
 said trial, that the last time he saw said bill of indictment, it
 was lying on the bar about fifteen minutes before the conclud-
 ing speech in said cause was finished, that when the said ar-

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gument was finished, and the judge was about to charge the jury, he called for said bill of indictment, but it was gone, that he has made most diligent search for the same, but without success; also states that the above copy of the indictment is the same as the original upon which said Harrison was arraigned.

R. B. TURNER.

Sworn to before me in open court, this 15th February, 1838.

JAMES RUCKS.

“Francis McGavock, foreman of the grand jury at the January term, 1838, of the circuit court of Davidson county, makes oath, that the indictment against William G. Harrison for a rape upon Patsy Mayo, was returned into open court by the grand jury, and was signed a true bill, Francis McGavock, foreman, of the grand jury, and he believes is the same as the above copy of the indictment against William G. Harrison.

FRANCIS M'GAVOCK.

Sworn to in open court, 15th February, 1838.

R. B. TURNER, Clerk.

“Edwin H. Ewing, one of the counsel who prosecuted for the State in the case of Wm. G. Harrison, mentioned in the affidavits of John Trimble, Robert B. Turner and Francis McGavock, makes oath, that he examined the indictment in said case, particularly, with a view to any motion that might be made in arrest of judgment; he has also examined the copy or professed copy of said indictment, and the endorsements thereon on the other half of this sheet written. Affiant does not recollect particularly in regard of the formal parts of the indictment, but believes them to have been in this respect as usual in regard to the substantial and material allegations; he recollects them to have been, and in fact has no doubt that they were as stated in the copy referred to. The endorsement of “Francis McGavock, foreman,” was also upon it, signed “a true bill.”

EDWIN. H. EWING.

Sworn to in open court, 15th February, 1838.

R. B. TURNER.”

After examining the alleged copy of the indictment and the affidavits, the court ordered the following entry to be made a part of the record:

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appeared in open court and moved the court that the follow-
ing copy of the indictment in this case and the affidavits an-
nexed, be made a part of the record in said cause, whereupon
the court upon examination and inspection of the same, or-
ders the same to be spread upon the minutes and made a part
of the record in this cause.” The copy of the indictment
and the affidavits before referred to, were also inserted in the
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The court afterwards arrested the judgment, upon which occasion a bill of exceptions was sealed by the court. In the bill of exceptions the judge recited that the copy of the indictment was filed upon record by him, not merely from the affidavits but because the court “was fully satisfied that said copy of said indictment so ordered and made part of the record, was an exact literal copy of the original indictment, not only from the affidavits appended to said copy, but from the recollection and memory of the court itself.

Previous to arresting the judgment, a motion was also made for a new trial, which was overruled. The bill of exceptions taken upon overruling the motion for a new trial, presented several question, which, however, it is unnecessary to notice, as the opinion of the court was based wholly upon the entry supplying the loss of the indictment and making a copy a part of the record.

Geo. S. Yerger, Atty. Gen. and E. H. Ewing, for the State, contended that when an indictment or any part of the proceedings were lost or stolen, or altered or defaced, the court could so amend the record as to let it appear what it originally was, and when an indictment was lost, the court could during the term supply the deficiency by a copy. They cited 1 Ch. Cr. Law, 722, 754: 2 Ld. Ray. 1067: 1 do. 695, 565: 2 Vin. Ab. 312, 313: 1 Caine’s Rep. 104: Lilly Entries, 523: Andrews’ Rep. 13: Barnes’ Rep. 14: 1 Strange, 141: 2 do. 1077, 1246: 1 Salkeld, 47, 53: 22 Com. Law. Rep. 226: Blackmore’s case, 4 Coke’s Rep. 452.

W. Thompson and J. T. Holman, for defendant. We
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contend the judgment was rightly arrested, because of the loss of the indictment. See 2 Chitt. Black. 288: 1 Comyn's Dig. title amendment, 577, letter *a*: do. 583 *d*: 578, *b*: 609, *y*: 613 and note: 6 Mod. 281: Cro. Car. 144: 1 Stark. Ev. 136, top page: 1 Saund. 250, top: 1 Comyn's Dig. 592, in note: 4 Coke's R. Blackmore's case, 452. At bottom of page 460, (top page,) it is said supplying a stolen or defaced record, is amending the record, and can only be done where there is something in the record to amend by, or where there is an exemplification of the record.

The Attorney general says that this is not a question of amendment, but soon commences reading cases where amendments have been allowed, and most of them governed by the English statutes of amendments, being civil cases, and they almost uniformly speak of amending by other parts of the record, by the paper books, by the associate notes, &c.

TURLEY J. delivered the opinion of the court.

The power of courts to amend and supply their records when they have been left imperfect by the misprison of the clerk, or have been destroyed, either by accident or design, cannot be disputed; its existence is essential to a correct administration of justice. It is, however, a very delicate power, and might be subject to much abuse, especially in criminal cases, if the extent to which it might be carried was not well defined and properly checked by law. This we think is done. It has been correctly observed, that the judge during the term is a living record, and therefore during that period of time, he may alter and supply from his own memory, any order, judgment and decree which has been pronounced, and this because having made then himself, he is presumed to retain them in his recollection. But by the provisions of the common law, after the term had elapsed, the judge had no such power, because it was supposed that there would be a period at which a judge would cease to retain in his memory the things which had been ordered and adjudged, and that period it was well conceived might be the end of the term, as he would then be apt to dismiss from his thoughts the things which had been previously passing in them. But it

being ascertained by experience, that misprison of clerks were frequently made which were not discovered during term time, and therefore could not be corrected, as a remedy for which the statutes of 14th Ed. 3d Ch. 6th and 8th Hn. 6 c 45, were passed, greatly enlarging the powers of the courts upon this subject, the general provision of which need not be examined, as it is admitted that they do not apply to the case under consideration. It may not however be amiss to observe that it is held in Arthur Blackmore's case, 4 Rep. 156 a. that although the 8th of Hen. VI. authorises an amendment of the record, where any part of it has been stolen, carried away, withdrawn or avoided, yet the part thus lost cannot be thus supplied, unless it can be done by other parts of the record or by an exemplification of the record. This decision it is said is not applicable to the present case, because the record has not been supplied under the provisions of this statute, but under the provisions of the common law, which it is urged permitted records to be supplied in all cases from the memory of the judge, without requiring it to be done by other parts of the record, or by any exemplification thereof, provided this be done at the term at which the accident happened. This brings us directly to the enquiry of what powers the court can exercise on this subject.

We have said that a court has the power to alter and supply from its memory alone, any order, judgment or decree pronounced by it at the same term, and this manifestly because the term constitutes but one day in the estimation of the law, and every thing is in *fieri* that is not unalterably fixed and determined by its adjournment. This principle doubtless applies with more force to things which have emanated from the court itself, because the judge may well recollect what he has himself directed to be done, and find it impossible to remember what has been done by others. This is peculiarly applicable to bills of indictment, which are drawn by the attorney general without consultation with the court, and acted upon by the grand jury, not under the immediate inspection of the court until the offender is arraigned for trial, and then in such a cursory way as to render it difficult for him to supply their loss from memory. No judge would rashly undertake so to

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do. It is not so done in this case. The entry is in the words following: "The attorney general appeared in open court and moved the court to make the following alleged copy of the indictment and affidavits a part of the record in said case, whereupon the court upon an examination and inspection of the same, ordered the same to be spread upon the minutes of the court and made a part of the record of the cause." There is nothing here showing that this was done upon the recollection and memory of the judge. But it is said that this appears in another part of the record, to wit, a bill of exceptions taken to the opinion of the court sustaining the motion in arrest of judgment. It is true, it is there stated by way of recital, that the court considered the reasons assigned in arrest were good and sufficient, notwithstanding the court was fully satisfied that the copy of the bill of indictment ordered to be made a part of the record, was an exact literal copy of the original, not only from the affidavits appended thereto but from the memory and recollection of the court itself.

If the indictment could be supplied from the memory of the judges, the records must show explicitly and with certainty that it was so done. This recital in the bill of exceptions does not amount to this. To establish the principle that a judge might supply a lost bill of indictment upon the affidavits of others, independent of his own recollection, would, as we think, be exceedingly dangerous to the lives and liberty of the citizens, and we cannot do so. We think we go far enough in saying that this may be done upon the memory of the judge. Furthermore, before a record can be supplied by the court, there must in our opinion be an adjudging by the court, that the original is lost. There is nothing in this record showing that there was such a judgment of the court pronounced, and we have no evidence that the original bill of indictment is not in existence, save the affidavit of the clerk, which we think is not sufficient to warrant us in passing sentence on the prisoner upon a copy of the bill of indictment spread upon the records in the court below. We therefore affirm the judgment of the inferior court, and commit the prisoner for a new prosecution.

Judgment affirmed.

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YATES vs. THE STATE.

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Where an indictment laid a watch stolen to be the property of A, and the proof was that B was the general owner, but that he had exchanged watches with A for a few weeks, and the watch was stolen whilst in the possession of A: Held, that A had a special property in the watch sufficient to sustain the indictment.

- Where in a bill of exceptions, after reciting the evidence, it is stated that "here the evidence closed:" Held, that this was a sufficient averment that all the testimony heard at the trial was put in the bill of exceptions.

If, it does not appear from the record, that the venue was proved, the judgment must be reversed.

This was an indictment for larceny, found in the mayor's court of Nashville. The defendant was convicted and prosecuted a writ of error to this court. The facts are stated in the opinion.

J. T. Holman, for plaintiff in error.

Geo. S. Yerger, Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The indictment in this case charges the property in the watch, which was stolen, to have been in Caldwell. The proof is, that the watch belonged to Singleton, the parties having exchanged watches for a few weeks, or until Singleton should call for his own. The watch was stolen from Caldwell while he was thus in possession of it.

We think the property in the watch to be well laid in Caldwell. This is not the case of a bare charge, where the possession still remains in the owner. It is a stronger case than where a friend is intrusted with property to keep for the owner's use, (2 Rus. on Cr. 108,) or the coachman's possession of a box which had been put in the coach. 2 Rus. on Cr. 159. In each of which cases it was held, there was a special property in the party, and that it was not a bare charge. Here, Caldwell had exchanged his own watch for the one he had in possession, which he had a right to hold as a pledge for the return of his own.

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2. There is no proof in the record that the offence was committed in the town of Nashville, so as to give the court jurisdiction. But the Attorney General insists that it does not appear that all the evidence is set out in this record, and therefore we are to presume there was sufficient evidence to warrant the conviction. We think the record shows the whole case. It is not like the case of *Everett vs. The State*, (at Knoxville,) In that case the record did not purport to set out all the facts. It did not give the evidence of the witnesses in detail, and in the order of their examination; on the contrary it was manifest that it was not intended to set out the whole of the evidence, but such facts only as applied to the point of law which was intended to be raised upon the charge of the court. This record manifestly purports to set out the whole case. The witnesses were introduced in regular order, and the testimony of each is minutely set out, after which are the following words: "Here the evidence closed."

Had these words been omitted, we should have been strongly inclined to think that the record ought to have been regarded as containing the whole case. But we cannot doubt that they were intended to be used as equivalent to a declaration that what had been written included all the proof.

It would be doing violence to the obvious sense of the expression, to suppose that there was other testimony than that which was set out in the bill of exceptions, and that the writer only meant that the deposition last written was the evidence of the witness last examined in court.

This sense of the expression renders it impossible to perceive any sensible reason why they were used at all. They could answer no end but to mislead.

Reverse the judgment and remand the prisoner.

Judgment reversed.

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DALE vs. THE STATE.

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The State

In order to constitute murder in the first degree, a design must be formed to kill wilfully, that is of purpose, with the intent that the act by which the life of a party is taken, should have that effect—deliberately, that is with cool purpose—maliciously, that is with malice aforethought; and with premeditation, that is, the design must be formed before the act by which the death is produced, is performed.

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Where the circuit judge stated, "that the jury are the judges of the law as it applies to the facts, they are the exclusive judges of the facts, but in making up their verdict they are to consider the law in connexion with the facts, but the court is the proper source from which they are to get the law, in other words, they are the judges of the law as well as the facts, under the direction of the court: Held, that this was a correct exposition of the law. *

Neil S. Brown, for plaintiff in error.

Geo. S. Yerger, Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

In this case the plaintiff in error was found guilty of murder in the 1st degree, in the circuit court of Giles, and judgment of death was pronounced upon him, from which judgment he prosecutes his appeal in this court. It is contended, that the evidence did not warrant a conviction for murder in the first degree, and that the case is only one of murder in the second degree.

By the third section of the act of 1829, c 23, it is enacted, that "all murder which shall be perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree." When the act of killing is not done in the commission or attempt to commit some felony, nor by poison, or lying in

* Vide *United States vs. Battiste*, 2 Sumner's Rep. 240.

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wait, in order that it be murder in the first degree, the killing must be done wilfully, that is, of purpose with intent that the act by which the life of a party is taken should have that effect, deliberately, that is, with cool purpose; maliciously, that is, with malice aforethought, and with premeditation, that is, a design must be formed to kill, before the act, by which the death is produced, is performed. In other words, "proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result, which the concurring will, deliberation, and premeditation of the party accused, sought. 1 Leigh's Rep. 611. With this understanding of the act of assembly, we proceed to notice the proof in the cause.

Benjamin Tilman, the first witness introduced, says, that as himself and Loving were returning home along the public road, which was in eighty or one hundred yards of Dale's house, on the evening of 24th June, 1836, being too dark to see to shoot any distance, they heard a gun fire, and that witness knew it to be the report of Dale's musket; that they suspected mischief had been done and rode towards Dale's house; that upon approaching within forty yards of the house they heard loud talking, and knew it to be Dale's voice, that they heard Dale say, "I have shot you, I told you I would shoot you, I intended to do it, and I have done it, and I would do it again. You said you loved me too well, and that I was too good a friend of yours to shoot you." Dale was standing in his door as witnesses rode up, but as they approached he withdrew into the house and closed the door. When they rode up to the yard fence they saw a man lying near the fence, and on examining him they found that it was James McCafferty, and that he was dead; but was then limber and bleeding, from a wound in his left side, which was made by a shot from a gun. McCafferty was lying outside of the fence, and the fence was ten steps from the house. All the shot went in at the same hole, and the gun must have been very near to McCafferty when it fired, or all the shot would not have gone in at one hole. Witness and Loving procured assistance and apprehended Dale. He was asked why he had killed McCafferty, he said, that when he came

home he found McCafferty there, that he wanted to stay all night, and that he shot him. When asked by another person what this meant, he said McCafferty was throwing sticks at him. They looked for sticks but none were found. Loving corroborates Tilman's evidence, except that he does not remember the words Dale used as they approached his house, but that he heard him say, that he told him to go away, and if he did not go away he would kill him. To another witness Dale said, that when he came home he found the deceased at his house, and that he wanted to stay all night, and that he would not let him. That McCafferty was started off by defendant, and was gone a short time and came back and said he must stay. Defendant told him he could not, deceased then said he would stay, whereupon defendant took down his gun and shot him, saying, that he was not going to have his house imposed upon. To another witness, he said, that McCafferty had insulted his wife. On the day the killing took place, Dale and McCafferty were both at Campbellsville, and Dale had been drinking very freely. It was not proved that Dale was acquainted with McCafferty. Both Dale and McCafferty were proved to have been peaceable men.

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Let us now apply these facts to the principles laid down in the outset, and ask ourselves, "Was the death of McCafferty the ultimate result, which the concurring will, deliberation and premeditation of Dale sought?" We are constrained to answer in the affirmative. His statement that McCafferty threw sticks at him, is entitled to no credit. Indeed he seemed conscious of this himself, for when they looked where he said the sticks were thrown and found none, one of the witnesses told him he did not believe the statement, to which he made no reply. If the sticks had been thrown, they must have been there when the witnesses sought them, for the occurrence had been too recent for them to have been removed. The statement that McCafferty had insulted his wife is alike unworthy of credit. This statement was made to only one witness, and that not till after his tale about the sticks had been discredited. How then does the case stand? Taking his account of the affair after he was appre-

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hended, in connexion with the expressions which Tilman and Loving heard him utter, as they rode up, and we have simply the case of an urgent application of McCafferty to stay all night, repeated by him after the refusal on the part of Dale, and a threat to kill him, if he did not go away, and upon his pressing his application he is shot through the body. It will not be doubted, but that Dale intended to kill McCafferty when he fired the gun; he was very near to his object, so near that all the shot made but one hole: he must have expected therefore that the charge would take effect. Was not the act deliberately done? It was upon no sudden emotion, hastily and without reflection; before he fired, he warned the deceased and threatened to shoot him. McCafferty told him he was too good a friend for that, and disregarding the warning pressed his application to stay all night. The shooting, after all this, must have been the result of a deliberate purpose. It was a purpose previously conceived in the mind and determined upon by the defendant. When he first made the threat, he had conceived the thought, and determined upon what he would do, if McCafferty persevered in wishing to stay, and when that disposition was further manifested by McCafferty, Dale fired upon him, intending deliberately and with premeditation to kill him. We think therefore the jury were warranted in finding a verdict of murder in the first degree.

No objection is taken to the charge of the court. A conversation between the circuit judge and the counsel for the defendant, while the cause was in progress before the jury, is certified in this bill of exceptions, and it is supposed that the suggestions of the judge in that conversation differ from the opinion of this court in *M'Gowan vs. The State*, 9 Yerger's Reports, 195. It is questionable whether that conversation formed any part of the proceedings of the case, and consequently whether it was not improperly certified in the bill of exceptions. The judge in it does not purport to decide the question, or to prevent argument. If he had done either of these, it might have been proper to certify the facts that occurred. But there is no error in the remarks of the judge upon the legal question, if we regard what was said in the

light of a charge to the jury. In M'Gowan's case the circuit judge had said, "The court was to be the judge of the law, and the jury exclusively judges of matters of fact, and it was the duty of the jury to receive the law as laid down and expounded by the court, and that the jury was not the exclusive judges of the law."

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When the cause came before this court, after remarking upon some inaccuracies in the sentence above quoted, the court, concurring with the case in 10 Pickering's Rep. 496, lay down the law to be that as the jury have a right to find a general verdict of guilty or not guilty, and consequently to decide the questions of law and fact, involved in the general question, and if they acquit a party no tribunal can review or set aside their verdict, it must follow that they are judges of the law as well as the fact; but that it is the duty of the court to expound the law to them, by which they may be safely guided, and to disregard it, (which they have the power to do,) is to assume a high responsibility, and should never be done by a jury unless they know they are right. In the conclusion of the remarks of the court upon that head, the court say, in reference to the charge of the circuit court, that although there were some inaccuracies of expression, yet they were not such as to constitute ground of error.

In the case before the court, the judge says, "The jury are the judges of the law as it applies to the facts; they are the exclusive judges of the facts, but in making up their verdict they are to consider the law in connexion with the facts, but the court is the proper source from which they are to get the law, in other words, they are the judges of the law as well as the facts, under the direction of the court."

This statement we consider substantially correct, and in accordance with the opinion of this court in the case of *M'Gowan vs. The State*, before referred to, and which opinion, after mature consideration, we re-affirm. There is therefore no error in the record in this case, and the judgment must be affirmed.

Judgment affirmed.

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TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

ABSENT DEBTORS.

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ACQUITTAL.

1. When the discharge of a jury operates as an acquittal, *Vide* Jury 5, 6, 7, 8, 9, 10, 11.

ACTION.

Vide EXECUTOR & ADMINISTRATOR, 11, 15, 16.
BOND, 1, 2.

1. Where an instrument is jointly executed to several, one of the joint payees or obligees, or his assignee, may sue in the name of all, without their consent. *Wright v McLemore*, 235
2. Actions of debt and *indebitatus* are concurrent remedies in cases of simple contracts for the payment of money, either impress or implied. *Thompson v French*, 452
3. In all cases where the consideration has been executed, and where there is an express or implied pro-

mise to pay in money, the value thereof, *indebitatus assumpsit* or debt, is the proper remedy. *Ib.*

4. In all cases where the consideration is not executed, or if it be and the promise to be performed in consideration thereof, is not to pay money, but to do some other thing, neither *indebitatus assumpsit* nor debt will lie, but the remedy is by a special action on the case. *Ib.*
5. A dowress cannot maintain an action of assumpsit for use and occupation against a tenant from year to year, for rents which accrue after the death of her husband; and before the assignment of her dower, although no damages were given to her when her dower was assigned. *Thompson v Stacey*, 493
6. If a separate and distinct action would lie by a widow to recover damages after an assignment of dower, it must be brought against the tenant of the freehold, whose duty it is to assign dower, and not against a tenant for years. *Ib.*
7. The law never implies a promise to pay, unless the consideration has passed to the person sought to

be charged, or to some other person for whom he is bound by law to provide. *Hill v Childress*, 514

8. Where one man is bound by express contract to pay for services rendered, the law, in general, never imposes the same obligation on another by implication. *Ib.*

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Vide EXECUTOR & ADMINISTRATOR.

ADVANCEMENT.

1. Under the statute of distributions of Tennessee, although there is a will and only a partial intestacy, still advancements made in the life time of the testator, must be brought in upon a division of the said undivided personalty. *Pearce v Gleaves*, 859
2. In cases of partial intestacy, the devises or bequests in the will of either real or personal estate, are not, under the act of 1766, advancements made in the life time of the testator, therefore, they are not to be brought in and accounted for, in the distribution of the unbequeathed residue of personal property. *Ib.*

AGREEMENT.

Vide CHANCERY.

1. A and W contracted with the defendants to supply the town of Nashville with water from the Cumberland river, and to build and keep in repair "water works" for that purpose. Among other stipulations contained in the contract was the following: "The said A and W further contract, that if at any time after the completion of said works the same shall get out of repair and so remain for the space of ninety days, so that the town is not supplied with water, as herein provided, then the mayor and aldermen for the time being, may take possession of said works in behalf of the corporation, and

use and occupy the same as their own, and shall only in such case, be liable to pay the said A and W the one half of the amount by them expended in the construction thereof, over and above the five thousand dollars advanced as before stated." The house containing the works of the machinery was burnt down, and never was rebuilt, and the works rendered useless. The machinery was left upon the lot. The mayor and aldermen, after the expiration of ninety days thereafter, took possession of the lot on which the works were erected: Held, that they were liable to pay A and W one half of what they had expended in the construction of the works over the \$5000 advanced to them, as stipulated in the covenant.

Pearl v Corporation of Nashville, 179

2. Where a contract for the delivery of cast iron pipes stipulated, that a particular test, to wit, a water pressure equal to a column of water three hundred feet in height, shall be applied to ascertain their quality, no additional or severer test than that stipulated for can be applied. *Steele v Corporation of Nashville*, 296
3. Where cast iron pipes were to undergo a certain test at the furnace, and were afterwards to be delivered in Nashville, but the party receiving them was at liberty to reject all the pipes at their arrival in the city, which were found defective, although they had been previously tested at the furnace: Held, that if they were received without objection at Nashville, they became the property of the party who thus received them. *Ib.*
4. A executed a promissory note to B, the consideration of which, was the sale of an interest in lands granted by the Republic of Mexico; the grant required certain conditions to be performed within a specific time, which B was to go to Mexico and have performed. B, before the expiration of the time when the conditions were to be performed, endorsed for value,

the note to C, who knew at the time, that the note was given for the above consideration. B subsequently died before the performance of the conditions: Held, that the consideration for which the note was originally given had failed, but the failure of consideration being subsequent to the endorsement to C, could not affect his right of recovery against A. Held also, that the above contract was valid, being neither *malum in se* nor *malum prohibitum*. *Alderson v Cheatham*, 304

ALIEN.

1. By the treaty of 1783, Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively, and those persons became aliens to the government to which they did not adhere. *Moore v Wilsons' Administrators*, 406
2. Where it is shown that a native of Scotland was domiciled here before the close of the revolutionary war, *prima facie*, he is to be considered a citizen of the United States. If alienage is asserted, it must be proved that "he adhered to the British government." *Ib.*
3. Where a party was resident in the United States prior to the treaty of 1783, adherence to the British government, and not his foreign birth, constitutes him an alien. *Ib.*
4. By the provisions of the act of 1809, c 58, an alien resident in the United States, and next of kin to an intestate, who dies without issue, is entitled to inherit his estate. *Ib.*

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APPEAL.

Vide SETT OFF, 3.

ARBITRATION.

Vide AWARD.

ASSUMPSIT.

Vide ACTION, 2, 3, 4, 5, 6, 7, 8.

ATTORNEY.

1. An express contract is necessary to enable an attorney to recover compensation from a father for services rendered his minor child, in defending him upon a charge of murder. *Hill v Childress*, 514
2. An express promise to pay need not, however, be proved by direct and positive testimony, it may be inferred from circumstances; as where an attorney appears for a minor, and the father is present, aiding, and assisting, and consulting with the attorney in conducting the defence, in the absence of proof to the contrary, a jury would be warranted in finding that the attorney had been retained by the father. *Ib.*

AUDITA QUERALA.

Vide CERTIORARI, 4.

AWARD.

1. Courts of chancery exercise the power of modifying and setting aside awards for fraud or mistake, but this power will not be exercised unless the proof is clear. *Hardenan v Burge*, 202
2. By a rule of court, a cause is referred to arbitration, and no time is limited within which to make the award: Held, that an award made and returned the second term after the order was made is valid. *White v Puryear*, 441
3. If a time be fixed by a submission, either by contract or rule of court, within which to make the award, the arbitrators have no power to act after the time elapses. *Ib.*
4. If no time be limited within which to make an award, the arbitrators

may act at any time until their authority is revoked. *Ib.*

B

BANK.

Vide CORPORATION, 1.

BANK STOCK.

Vide EQUITY, 33, 39, 40.

1. A stockholder in a bank has an entire and perfect ownership over his own stock, and may sell and transfer it to whom he pleases, and from doing which, the bank has no power to restrain him. *Brightgell v Mallory*, 196
2. Stock in bank entitles the owner to his proportion of the dividends which may be declared from time to time, and when the institution closes its business, to his proportion of the capital stock and profits which may remain to be divided. *Ib.*
3. Before bank stock can be sold in equity under the act of 1832, c 9, to satisfy a debt, there must be a judgment and execution against the debtor. *Ib.*
4. A bill is filed against the owner of stock to have it sold, and the bank is made a party. The bill alleges there was a judgment and execution against the owner, a decree was pronounced ordering the stock to be sold, from which the bank, but not the owner appealed: Held, that the bank has no right to call in question the validity of the judgment. *Ib.*

BANK NOTES.

Vide TENDER, 1.

BARON AND FEME.

Vide HUSBAND AND WIFE.

BILL OF EXCEPTIONS.

1. A power of attorney transcribed in the record, but not embodied in a bill of exceptions, constitutes no

part of the record. *Galt v Dibrrell, et. al.* 147

2. In general, if the bill of exceptions does not state that all the evidence in the cause is contained in it, the court will presume the evidence was sufficient to support the verdict. *Trott v West, Moss & Co.* 499
3. Where in a bill of exceptions, after reciting the evidence, it is stated that "here the evidence closed:" Held, that this was a sufficient averment that all the testimony heard at the trial was put in the bill of exceptions. *Yates v The State*, 549

BILLS OF EXCHANGE AND PROMISSORY NOTE.

Vide PROPERTY CONTRACT, 1, 2.

1. A promissory note, executed without consideration, and with a view to protect the maker's property from his creditors, cannot be enforced against the maker by the payee. *Walker v McConnico*, 228
2. Where an instrument of writing is called a note, in a deed of trust, the court cannot infer it was a sealed instrument. *Ib.*
3. Where an affidavit states the instrument sued on and lost, as a "note," it cannot be intended by the jury that it had a seal to it. *Wilon v Turk*, 247
4. Where an instrument is jointly executed to several, one of the joint payees or obligees, or his assignee, may sue in the name of all, without their consent. *Wright v Mc-Lemore*, 235
5. Where a negotiable instrument has been endorsed for value, a subsequent failure of the consideration on which the note was originally given, cannot affect the right of the endorsee. *Alderson v Cheatham*, 304
6. A executed a promissory note to B, the consideration of which, was the sale of an interest in lands granted be the Republic of Mexico; the grant required certain conditions to be performed within a specific time, which B was to

go to Mexico and have performed. B, before the expiration of the time when the conditions were to be performed, endorsed for value, the note to C, who knew at the time, that the note was given for the above consideration. B subsequently died before the performance of the conditions: Held, that the consideration for which the note was originally given had failed, but the failure of consideration being subsequent to the endorsement to C, could not affect his right of recovery against A: Held also, that the above contract was valid, being neither *malum in se* nor *malum prohibitum*. *Ib.*

7. Where the complainant, the accommodation endorser on a bill single, verbally notified the holder to sue the maker and prior endorsers at a time when, if suit had been brought, the money could have probably been made, but which he neglected to do until they became insolvent, it was held, (notwithstanding a judgment by default had been taken against the complainant,) that he was discharged in equity. *Thompson v Watson*, 362
8. A note due to a bank, which is taken up by the proceeds of a note discounted to renew it, is in general extinguished. *Hill v Bostick*, 410
9. A endorsed a note for B, which was about to fall due. B applied to A to endorse another note for the purpose of renewing the first, which A refused to do, C however agreed with B to endorse it, provided A should be held responsible as endorser on the first note. The first note was protested, and A duly notified; B, thereupon executed a note which was endorsed by C, with the express understanding between him and B, that A was to remain responsible. This note was discounted, and the proceeds of it applied to take up the first note. C then sued A as endorser on the first note: Held, that the first note was extinguished and A was not liable. *Ib.*
10. If the holder of a note take a fur-securty, and agree to give time, he thereby discharges the endorser or surety. *Ib.*
11. If no express agreement by the holder, to give time to the principal debtor is proved, yet if he take a collateral security payable at a future time, in the absence of proof to the contrary, an engagement to wait until the security become due will be applied. *Ib.*
12. A left blank endorsements of his name with B with a view to aid B in his business and to sustain his credit. No restriction was imposed as to the use to be made of them. B filled up a note with A's endorsement thereon, and passed it to C as a security for an existing liability of B: Held that A was responsible to C upon such endorsement. *Kimbrow v Lytle*, 417
13. Where an endorsement in blank is left with A generally and without restriction, it is an assent by the endorser that A may pledge it as security for his existing liabilities, or use it any other way lawful and necessary for his accommodation and credit. *Ib.*
14. No equities existing between the original parties to a note can be set up against a *bona fide* holder, when taken and received by him in a "due course of trade." *Nichol v Bate*, 429
15. A note taken in a "due course of trade," is, where the holder has given for the note his money, goods or credit, at the time of receiving it, or sustaining some loss or incurred some liability. *Ib.*
16. Where a note is taken in payment of a debt due and secured by endorsement of a third person, which last note is given up and discharged: Held, that the note is taken "in a due course of trade."
17. In all cases of notes endorsed, where one is fairly received in renewal of another, it discharges the first, and the second is taken "in the usual course of trade," and for a good consideration passing at the time. *Ib.*

BILL OF REVIEW.

Vide CHANCERY, 5, 6, 7.

1. Where a decree is rendered which does not recite or allege the facts upon which it is founded, or which the court considered as proved, it is error apparent on the face of the decree, for which a bill of review will lie. *Burdine v Shelton*, 41
2. There are only three grounds for which a decree can be reversed upon a bill of review. 1st. For error apparent on the face of the decree. 2d. For new matter which hath arisen in time after the decree. And 3d. Where proof hath come to light since the decree, and could not possibly have been used at the time when the decree was rendered. *Bledsoe v Carr*, 55
3. To authorise a bill of review for new matter which hath "arisen in time after the decree," it must be matter which was in existence at the time the decree was rendered, but was not known to the party until afterwards. *Ib.*
4. The rendition of a decree in another court, is not "new matter" within the meaning of the rule. *Ib.*
5. A died leaving three heirs and possessed of three tracts of land, one for 4000 acres, one for 500 acres, and one for 506 acres. B, one of the heirs, before a partition, sold the 500 acre tract to C, and executed his individual bond. C filed a bill for a partition. The court made an equal division of the whole and assigned to C the 500 acres sold to him, deducting it out of the share of B. Whilst this suit was pending and before the decree was pronounced, a bill was filed by D in another court for a specific performance of a contract made by the ancestor A, in which a decree was rendered about a week after the first decree, for 2280 acres in favor of D, which was allotted to him out of the 4000 acre tract. This produced an inequality in the

first division, made under the first decree, to correct which a bill of review was filed: Held, that it would not lie. *Ib.*

6. A bill of review will not lie in the supreme court to review or reverse its own decree. *Wilson v Wilson*, 200

BILL OF SALE.

Vide MORTGAGE, 3, 4, 5.

1. Where a bill of sale is made to a minor or infant of tender years, living with his father, which purports to be for a valuable consideration, the court cannot merely from the fact of infancy, infer that the consideration was paid by the infant's father. *Cocke v Trotter*, 213
2. The presumption of law is, that the consideration stated in a deed or bill of sale passes, as the deed imports, from the vendee to the vendor. *Ib.*
3. A bill of sale, not registered or proved, is notwithstanding valid between the parties, it would only be void as to creditors and purchasers. *Ib.*
4. A bill of sale takes effect from its execution and delivery, (although not registered,) as against the donor and all who claim as volunteers under him. *Neely v Wood*, 486

BOND.

Vide CAPIAS AD SATISFACIENDUM, 1.

1. Where an administration bond is made payable to A B, chairman of the county court and his successors in office, instead of the governor, &c. as directed by law: Held, that no suit could be maintained on the bond by a successor to A B. *Hibbitts v Canada*, 465
- A. But in such case the bond is valid at common law, as a voluntary bond, and a suit may be maintained in the name of the personal representatives of A B, (he being dead) for the use of the distributees, &c. *Ib.*

C

CAPIAS AD SATISFACIENDUM.

1. Where a *ca. sa.* had issued and a bond in pursuance of the act of 1824, was executed by the defendant, conditioned to appear at the county court, and surrender his property, or take the insolvent debtors oath, or pay the debt; and neither of these things were done in the county court: Held, that the bond was forfeited, and they could not be performed afterwards upon an appeal to the circuit court. *Walker v Graham*, 231

CERTIORARI.

1. Two justices of the peace may, by the provisions of the act of 1833, c 65, grant a *certiorari* to remove the proceedings in a writ of forcible entry and detainer, into the circuit court. *Earl v Rice and Crenson*, 233
2. A petition for a *certiorari* and *supersedeas* stated that a judgment had been rendered by a justice of the peace against the petitioner, which judgment he had paid, notwithstanding which, an execution had issued on it, and prayed that the execution might be quashed. The process was granted, and the fact of payment tried in the circuit court and found against the petitioner: Held, that a *procedendo* must, in such case, be awarded, and that the circuit court could not give judgment for the debt and twelve and one half per cent. interest against the petitioner and his security. *Kincaid v Morris*, 252
3. The act of 1801, c 7, § 4, authorising two justices of the peace out of term time, to issue writs of *certiorari* and *supersedeas*, and the act of 1833, c 65, authorising two justices of the peace to grant writs of *certiorari* and *supersedeas* returnable to the circuit court, &c. only apply to cases where the par-

ty is dissatisfied with the judgment rendered against him, and wished a new trial on the merits, and not to cases where the judgment is not complained of, but from causes after its rendition, &c., no execution ought to issue upon it. *Rogers v Ferrell*, 254

4. Where the writ of *certiorari* and *supersedeas* is used in the place of an *audita querela*, the cause is not removed from the inferior to the superior jurisdiction; and if in such case the *supersedeas* is discharged, a *procedendo* must (in cases not provided for by the statute) be awarded to the inferior tribunal. *Ib.*
5. It is only in cases where the judgment of the inferior court is sought to be re-examined, that the proceedings are removed by the *certiorari*, in which case no *procedendo* ever was or ever can be awarded. *Ib.*
6. Where the judgment of a justice has been paid or otherwise discharged, and an execution issues thereon, the circuit court, by virtue of its general power, can grant writs of *certiorari* and *supersedeas* to quash the execution, &c. *Ib.*

CHAMPERTY.

1. Where mortgaged land is sold under a decree foreclosing the mortgage, the sale is not void by the provisions of the champerty act of 1821, c 66, although there was an adverse possession when the bill was filed, and at the time when the decree and sale was made. *Sims' lessee v Cross and Marberry*, 460
2. Judicial sales, or sales made by virtue of a judgment or decree, are not champertous, although there is an adverse possession at the time of the decree and sale. *Ib.*
3. The champerty act of 1821, does not apply to conveyance made in fulfilment of *bona fide* contracts, made and entered into before there was an adverse possession. *Ib.*

CHANCERY.

- I. *Award*, 30.
 - II. *Bill Qui a timet*—herein of property in remainder, when and to what extent protected, 2, 4.
 - III. *Decree*, 5, 6, 36.
 - IV. *Discovery*, 8.
 - V. *Interest, when compounded or not*, 37.
 - VI. *Jurisdiction*, (1) *Remedy at Law*, 1, 3, 24, 25, 33, 41. (2) *Void Judgment*, 42. (3) *Delivery up of instrument*, 9, 10. (4) *Execution of power by Land Commissioners*, 12. (5) *Non-residents*, 17, 18, 19, 20, 21. (6) *Sale of equitable interest, stock, &c.* 26, 27, 38, 44, 45, 46, 53. (7) *Account*, 22. (8) *Irreparable injury*, 31, 32. (9) *Failure of consideration*, 51.
 - VII. *Laches*, 3, 4.
 - VIII. *Pleading*, (1) *Multifariousness*, 54, 55. (2) *Statements in bill*, 13, 14, 39, 40. (3) *Statute of Limitations, when it must be pleaded*, 15. (4) *Purchaser without notice*, 47, 48, 49, 50. (5) *When decree will be made on the answer*, 14.
 - IX. *Practice*, (1) *Evidence before clerk and master*, 16. (2) *Revisal of decree at subsequent term*, 28. (3) *Setting cause for hearing, remanding, &c.* 35. (4) *What interest allowed upon appeal*, 52.
 - X. *Rehearing*, 7. (*Vide title Bill of Review.*)
 - XI. *Set off*, 11.
 - XII. *Surety*, 43.
1. In this case the judgment was compounded or paid to an agent of the *prochein amie*, who had, however, by letter, before the payment, revoked the agency. The minors, in whose favor the judgment at law was rendered, were distributees of the *prochien amie*, and their distributive share amounted to more than the judgment. It was *held*, that the judgment debtor should be left to his remedy at law, if any he had, against the administrator of the *prochein amie*, and that this court, under the circumstances, would not compel the minors to look to the estate of their intestate for payment. *Miles v Kaigler, et al.* 10
 2. Persons to whom personal property is limited in remainder, have a right to be protected and secured against probable danger of its destruction, or against more than ordinary deterioration or an hazard of the title. *Henderson v Paulx and Wife*, 30
 3. Courts of Chancery in this State interfere and protect the property and possession of a master to his slaves, although there may be a remedy at law. *Ib.*
 4. Where slaves are bequeathed for life in this State, the legatee for life has no right to remove them beyond the limits or jurisdiction of the State. *Ib.*
 5. The facts which are considered by the court as proved on the hearing, must be stated in the decree. *Burdine v Shelton, Admr.* 41
 6. Where a decree is rendered which does not recite or allege the facts upon which it is founded, or which the court considered as proved, it is error apparent on the face of the decree, for which a bill of review will lie. *Ib.*
 7. A rehearing of a chancery cause decided in the supreme court upon appeal, cannot be allowed at a term subsequent to that at which the decree was rendered, although the cause was retained in court for the purpose of taking an account. *Overton v Bigelow's Administrator*, 48
 8. Where the bill specially interrogates the defendants as to particular facts, (denied by the bill to exist,) and seeks a discovery from them, an answer responsive to those interrogatories, and stating affirmatively that the facts do exist, is evidence for the defendants. *Jones' heirs v Perry et al.* 59
 9. A court of equity has the power to order a deed, bond or other instrument to be delivered up and cancelled, if the same is void, whether it appear to be void on the face of the instrument or otherwise. *Ib.*
 10. A court of equity having jurisdiction to declare a deed void, and order the same to be cancelled, will retain the cause until the whole matter is disposed of and the rights of the parties settled. *Ib.*
 11. Where, in equity, a fund belonged to A, but the legal interest therein

- was in B, A filed a bill to prevent B from getting the fund into possession: Held, that if A was indebted to B, in a less amount, equity would compel him to discharge the debt, before the fund will be decreed to him, especially if A is insolvent. *Alexander v Wallace, et al.* 105
12. A court of chancery has jurisdiction to examine into the execution of the power conferred by the act of 1802, c 2, upon the commissioners to adjudicate land claims. *Maury and Wife v Lewis et al.* 115
13. Where the bill alleged that the defendant received certificate land warrants for land granted to the ancestor of complainants, which lands "were lost by the interference of an older and a better title in one Ezekiel Norris, or some other such like cause:" Held, that this was a sufficient allegation of the complainant's right to the certificate under the provisions of the act of 1807, c 2. *Ib.*
14. When the statement of the bill is defective in not showing the complainant's right, but it calls upon the defendant to set forth his title, &c. and the answer states with precision all the facts, &c. from which it appears the complainant is entitled to relief, the court will decree for complainant, upon the case made in the answer. *Ib.*
15. The defendant sold and appropriated certificate land warrants belonging to A. A filed a bill to recover the proceeds: Held, that the defendant could not avail himself of the act of limitations, without pleading or relying upon it in his answer. *Ib.*
16. The clerk and master in taking an account is bound to conform to the directions of the decree. Evidence taken before him which changes the complexion of the case as it appeared before the chancellor, and which had it been before the chancellor would probably have caused a different decree, cannot be heard, nor can it be noticed upon an appeal. *Ib.*
17. Under the act of 1787, c 22, § 1, where process is served on one material defendant, the court obtains jurisdiction over all others, no matter where resident, and may proceed to decree the matter in dispute, although the rights of the non-resident defendants are wholly distinct from the parties before the court. *Jackson v Tierman,* 172
18. To constitute a "material defendant," within the meaning of the above rule, the party on whom the process has been served, must have an interest in the matter in controversy, or a right which is to be affected by the decree. *Ib.*
19. Where a person had transferred all his interest in the subject matter of the suit, or it had been attached at the suit of a creditor and sold, and no decree is sought against him, he is not such a "material defendant" as will give the court jurisdiction to decree against others, who are non-residents, and on whom process has not been executed. *Ib.*
20. To give jurisdiction to the chancery court, against non-residents, by virtue of the provisions of the act of 1787, c 22, the whole transaction, or cause of action, must have accrued in Tennessee. *Ib.*
21. An assignment of part of the proceeds of tobacco, which had been shipped to Baltimore, was made in Tennessee to A; one of the partners to whom the tobacco was shipped, was notified of the fact in Tennessee, notwithstanding which the firm of which he was a member, attached the tobacco in Baltimore, sold it there, and applied the proceeds to their own use: It was held, that the "transaction" or cause of action accrued in Maryland, and that the court of chancery had no jurisdiction under the act of 1787, to make a decree in favor of A, without service of process upon the defendant. *Ib.*
22. Equity only has jurisdiction of matters of account, where there are mutual accounts, not where the items of account are all on one side. *Pearl, et al. v Corporation of Nashville,* 179

23. But if proof of the items of an account can only be had from the defendant, and a discovery is sought for and obtained, in such case equity having possession of the cause for that purpose, will retain it and give full relief. *Ib.*
24. When the remedy at law is inadequate, or embarrassed, and full relief cannot be had, equity will entertain jurisdiction and afford relief. *Ib.*
25. Where A and B contracted with C to build water works, &c. and failed to perform all which was incumbent upon them by the time stipulated, which contract they assigned to D, and a subsequent contract was made between C and D, adopting in part the contract with A and B, and waiving the non-performance by A and B: Held, that equity would entertain jurisdiction of a bill by D, to settle the rights of C and D, under both the contracts, the remedy of D, at law, if any, being embarrassed and inadequate to afford full relief. *Ib.*
26. Before bank stock can be sold in equity under the act of 1832, c 9, to satisfy a debt, there must be a judgment and execution against the debtor. *Brightwell v Mallo-ry*, 196
27. A bill is filed against the owner of stock to have it sold, and the bank is made a party. The bill alleges that there was a judgment and execution against the owner, a decree was pronounced ordering the stock to be sold, from which the bank, but not the owner appealed: Held, that the bank has no right to call in question the validity of the judgment. *Ib.*
28. Where a decree is rendered, and the court, afterwards, at the same term ordered, "that the decree should stand open to be revised at the next term upon a point reserved, but that in the mean time the decree be in all things executed notwithstanding the order, and that unless the decree be revised at the next term this order to have no effect whatever:" Held, that the case must be re-heard upon the point reserved at the next term, and could not be heard afterwards, and that the neglect of the clerk in sending the papers and records to another place to which the court had been changed by the legislature, will not alter the legal effect of the order. *Campbell v Rice*, 199
29. Before a court of chancery can rescind a contract for mere inadequacy of consideration, it must be gross and shocking, such as is equivalent to proof of fraud. *Hardeman v Burge*, 202
30. Courts of chancery exercise the power of modifying and setting aside awards for fraud or mistake, but this power will not be exercised unless the proof is clear. *Ib.*
31. Where there is a clear and certain right to the enjoyment of property, and an injurious interruption of that right, and where the injury is immediate and irreparable, and the remedy at law is from the nature of the injury imperfect, a court of chancery will entertain jurisdiction and give relief. *Caldwell v Knott*, 209
32. But if the right is not clear and manifest, and inconsistent with the assertion of a similar right in the defendant, a court of equity will not interfere until the right is ascertained at law. *Ib.*
33. The complainants' land was flooded by the mill pond of the defendant, and his spring injured. The defendant by way of defence, relied upon a parol license given by the complainant's ancestor to build the pond and overflow his land: It was held, that whether or not the parol license was binding, or could be revoked, was a legal question, and that the complainant could not resort to a court of chancery to destroy the dam until that question was determined at law. *Ib.*
34. Where the defendant's mill dam, which overflowed complainant's land, had been built more than ten years before the bill was filed, this was held to be such laches as prevented the interference of a court of equity until the right was tried at law. *Ib.*

35. Where bill and cross bill were heard together in the chancery court, but the rule docket only showed that the cross bill had been regularly set for hearing, this court will not remand the cause for such supposed irregularity. *Cocke v Trotter*, 213
36. Where a bill was filed to enjoin the sale of slaves, and to have them delivered to complainant, but the injunction was dissolved and the slaves were sold: Held, that a decree for the value of the slaves was not, under the circumstances, erroneous. *Ib.*
37. Interest on the hire of slaves due at the end of each year, calculating on each item, down to the taking of the account, should be allowed; but it is erroneous to compound it, by adding the interest to the principal each year. *Ib.*
38. It is the duty of a party before he sues the stockholders of the Fayetteville Bank, to obtain a judgment at law, if he can, against the bank, and ascertain by the issuance and return of an execution that there was no corporate property out of which his judgment could be satisfied. *Blake v Hinkle*, 218
39. A bill against the stockholders of the bank to subject them to individual responsibility, must aver and state facts from which it will appear that no judgment could have been obtained against the bank. *Ib.*
40. The bill stated, "that complainant was informed and believed that the affairs of the bank had been so fraudulently and negligently conducted, that no suit at law could be commenced against it, as the stockholders had failed and refused to elect directors, as they were required to do by the charter, and done many other acts contrary to the charter, whereby the corporation is dissolved, and by reason thereof no legal process can be served upon said corporation or its officers, if any there be in existence" The bill also avers, "that if a judgment could be had it would afford no relief, as there was no visible effects of said bank whereon to levy an execution:" Held, that these averments were insufficient to authorize a suit against the stockholders individually. *Ib.*
41. A court of equity does not require that a party to a contract shall go on after it is violated by the other party, in a ruinous fulfilment of it, in order that he may prosecute an action at law. In such case equity will entertain jurisdiction to put an end to the contract, and will afford such relief as to right and justice may belong. *Steele v Corporation of Nashville*, 296
42. Courts of chancery in Tennessee have jurisdiction to vacate and enjoin proceedings on a void judgment. *M'Nairy v Eastland*, 310
43. A surety who has paid the judgment against his principal, is substituted in equity to all the rights of the judgment creditor, nor need the judgment creditor in such case, where a bill is filed by the surety, be a party. *Ib.*
44. A creditor by judgment may file a bill in chancery to subject the equitable interest of his debtor in real estate to the satisfaction of his judgment, without having first issued an execution, or procured a return thereon of "*nulla bona*." *Ib.*
45. But where an equitable interest in personal property is sought to be subjected, an execution must issue and be placed in the hands of the sheriff of the county where the equitable assets were situated. *Ib.*
46. In regard to equitable real estate, the judgment creates the lien in equity; in regard to equitable personal estate, the issuance of the execution forms the lien, and the true principle upon which chancery assumes jurisdiction in such cases is to enforce the equitable lien which is thus created. *Ib.*
47. A purchaser for valuable consideration, without notice, may rely upon that defence, either by plea, or by way of answer. *High v Batte*, 335
48. When a purchaser for valuable consideration without notice relies on this defence in his answer, all

the requisites and certainty required to be set forth in a plea, must be contained in the answer. *Ib.*

49. A plea of purchase for valuable consideration without notice, must aver that the consideration money was *bona fide* and truly paid; a recital of that fact in the deed is not sufficient. *Ib.*

50. An averment in a plea or answer "that a full and fair consideration was paid" is insufficient; the defendant must state what he has paid, or in what the consideration consisted, in order that the court may judge whether the consideration is valuable. *Ib.*

51. Where a note or order evidencing indebtedness, is given up to the debtor for a claim on the government, which latter claim was not allowable by law: Held, that the consideration upon which the note or order was given up had failed, and as the note or order was delivered to defendant, equity had jurisdiction to set it up and decree payment of its amount. *Bedford v Brady*, 350

52. Decrees in chancery for money, do not bear twelve and a half per cent. interest per annum, from the time of their rendition in the court below until their affirmance in the supreme court. *Trainer v Skein*, 369

53. A judgment against an executor *de son tort*, of A, is not sufficient to give equity jurisdiction to proceed against equitable personal estate, belonging to A. *Gadsby v Donelson*, 371

54. A bill filed by an administrator, in conjunction with the heirs and distributees of the intestate, as complainants, to recover personal property in possession of defendant and divide and distribute it, is multifarious. *Thurman v Shelton*, 383

55. Where a bill is multifarious, advantage can only be taken of it by demurrer. *Ib.*

Vide BILL OF REVIEW, 1, 2, 3, 4, 5, 6.

EVIDENCE, 1, 2, 3, 4, 5, 6, 9.

IMPROVEMENTS, 1.

FRAUD, (TORTS.)

TRUST AND TRUSTEE.

CHATTELS.

Vide REMAINDER 1, 2, 3, 4, 5.

COMMISSIONER OF LAND CLAIMS.

Vide LAND WARRANTS, 1, 2, 3.

CONSTITUTIONAL LAW.

Vide IMPROVEMENTS 4.

1. The act of 1825, c 154, which authorised the guardians of the minor heirs of John Jones, deceased, to sell 450 acres of land descended to said heirs from their said ancestor, John Jones, and the proceeds of the sale of said lands to be applied to the payment of the debts created by said John Jones, in his life time, although the act might have been passed with the assent of the minor heirs, is unconstitutional and void. *Jones v Perry*. 59

2. The provisions of the constitution of Tennessee, (art. 5, § 1,) prohibit to the legislature the exercise of judicial power. The whole judicial power of the State being expressly vested in the courts by the constitution, the exercise of it by the legislature transcends the power entrusted to it by the constitution, and cannot be legally carried into effect. *Ib.*

3. An act of the legislature directing the real estate of certain minors therein mentioned, to be sold by their guardians, and the proceeds to be applied to the payment of their ancestor's debt, is judicial in its character. It is in form a law, but in substance and effect it is a judicial decree, directing and authorising the lands of minors to be sold to satisfy debts alleged to be due from their ancestors. *Ib.*

4. The term "law of the land" in the constitution of Tennessee, means a general and public law, operating equally upon every member of the community. *Ib.*

CONSIDERATION.

Vide **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1, 5, 6.

CHANCERY, 29, 51.

BILL OF SALE, 1, 2.

CONSTRUCTION.

Vide **AGREEMENT**. 1.

CONTRACT.

Vide **AGREEMENT**.

CONTINUANCE.

1. An affidavit for a continuance in a state cause, by the defendant, stated that A and B were material witnesses for him, they were summoned but did not attend, that he believes he will be able to prove by the witnesses a good character, and other facts of vital importance, &c. The affidavit did not show where the prisoner's domicile was, or that he had ever lived in the county where the witnesses reside, nor that his character could not be proved by others: Held, that it was insufficient to continue the cause. *Rhea v The State*.

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COPORATION.

Vide **INDICTMENT**, 3.

4. The failure to elect officers or directors of a bank, does not produce a dissolution of the corporation. *Blake v Hinkle*,

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D**DAMAGES.**

Vide **ERROR**, 1.

DEBT.

Vide **ACTION**, 2, 3, 4.

1. Debt lies to recover compensation for work and labor done, although there is no express contract as to the amount of compensation to be paid. *Thompson v French*, 452
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2. Wager of law has never been allowed or recognised in the courts of the State, and wherever it is not allowed, debt will lie against an executor upon a simple contract made by his testator. But if it were allowed, and debt were brought, the error can only be taken advantage of by demurrer. *Ib.*

3. In debt, where the damages recovered are more than the amount laid in the declaration, it is not error. *Ib.*

4. Where the declaration, in debt, for services rendered, stated the debt to be due 1st Janurry, 1836: Held, that as time in such a case was not material, interest could be recovered from the time the debt was due, although it was due anterior to the time laid in the declaration. *Ib.*

DEBTOR & CREDITOR.

Vide **FRAUDULENT CONVEYANCE**.

CHANCERY, 42, 43, 44, 45, 46.

1. By the law of Virginia, a deed or bill of sale, if not proved and registered is void as to creditors and purchasers, but it is good between the parties, and in a suit in another State, the registration in Virginia need not be proven, unless the controversy be with some one protected by the law requiring it to be registered. *Galt v Dibrell*, 146
2. Where the maker of a deed of trust of slaves resided in Tennessee, (the slaves being then in Virginia,) and the slaves were afterwards removed to Tennessee, they became subject to the laws of Tennessee, and if the deed is not recorded in Virginia, it is necessary as to creditors, to register it in Tennessee, according to her laws. *Ib.*
3. A debtor may by deed of trust prefer one creditor to another, yet he cannot thereby contract for his own benefit, and secure to himself the use and enjoyment of the property, if he does so the transaction is fraudulent as to other creditors. *Ib.*
4. A stipulation in a deed of trust, reserving to the debtor the right of receiving the rents and profits of

the lands, the hire of the slaves, and to have the superintendence and management of the merchandise, to the same extent as if the deed was not made, is totally inconsistent with the rights of other creditors, and renders the deed fraudulent and void as to them.

Ib.

5. A deed void as to creditors, is nevertheless good between the parties.

Ib.

6. A deed of trust was executed by A to secure certain debts, but contained stipulations which would render it void as to creditors, but there were no creditors of A at the time. A afterwards sold to B all his interest in the property conveyed by the deed of trust but subject to the debts specified in it. The deed of trust was duly proved and registered. A afterwards contracted debts, and judgments were obtained against him: Held, that the sale to B was not void as to such creditors, and that the property was subject to the debts specified in the deed of trust. *Ib.*

7. Where property is conveyed to trustee to secure debts due to certain creditors without their knowledge, they may affirm the trust when it comes to their knowledge, and it cannot be revoked by the debtor after such affirmation.

Galt v Dibrell, 147

8. Where a trust is created to secure the payment of debts which is not attempted to be enforced for ten years, this is not such laches as will discharge the trust as to creditors. *Ib.*

9. A bill of sale, not registered or proved, is notwithstanding valid between the parties, it would only be void as to creditors and purchasers.

Cocke v Trotter, et al. 213

10. A creditor by judgment, may file a bill in chancery to subject the equitable interest of his debtor in real estate to the satisfaction of his judgment, without having first issued an execution, or procured a return thereon of "*nulla bona*."

M'Nairy v Eastland, 310

11. But where an equitable interest in personal property is sought to be

subjected, an execution must issue and be placed in the hands of the sheriff of the county where the equitable assets were situated. *Ib.*

12. In regard to equitable real estate, the judgment creates the lien in equity; in regard to equitable personal estate, the issuance of the execution forms the lien, and the true principle upon which chancery assumes jurisdiction in such cases is, to enforce the equitable lien which is thus created. *Ib.*

DECREE.

Vide CHANCERY, 5, 6.

4. A decree which does not in terms divest the title of the defendant, but merely directs him to execute a deed with certain limitations prescribed in the decree, does not until the execution of the deed, divest the legal title out of the defendant. *Peak v Ligon,* 469
2. Where a decree, putting a construction upon an ante-nuptial contract, was rendered by the supreme court of North Carolina, in a suit between A and B, it is conclusive in a suit between the same parties or their privies in this State. *Ib.*

DEED.

Vide EXECUTION, 1.

VENDOR & VENDEE, 1, 2, 3.

REGISTRATION.

1. Where a deed of trust, by which slaves were conveyed, described them thus: "Nine slaves in the possession of A, and six in the possession of B," it was held that the slaves were described with sufficient certainty. *Galt v Dibrell,* 146
2. A narrative or statement of the clerk of a court in another State, endorsed on the back of a deed, that it was proved in open court by the subscribing witnesses, is not sufficient, (under the act of 1809, c 104, § 1,) to authorise its registration in this State. *Ib.*
3. Where a deed is proved in a court of record in another State, the only proof of the fact which will authorise it to be registered in this

State, under the provisions of the act of 1809, c 104, is a copy of the probate from the records, properly certified by the clerk and presiding judge, &c. *Ib.*

4. A power of attorney was proved as follows: State of Tennessee, Henry county, March term, 1824, the within power of attorney from Robert E. C. Doherty to Samuel McCorkle, was acknowledged in open court, by the subscriber thereto, and ordered to be certified for registration:" Held, that this was not a sufficient probate. *Crutchfield v Stewart's lessee.* 237
5. When an instrument, in form a deed, operates as a will. *Vide Will*, 12
6. The probate of a deed was as follows: "State of Tennessee, Franklin county, February term, 1820. Then the foregoing mortgage from John Doherty to Luke Tiernan & Son, for eight acres of land, was duly acknowledged in open court and ordered to be registered." E. Russell, clerk: Held, that this was a sufficient probate. *Estell v Miller*, 480

DEED OF TRUST.

Vide DEBTOR AND CREDITORS.

SHERIFF'S SALE. 1, 3.

BILLS OF EXCHANGE & PROMISSORY NOTES, 2.

1. Where a deed of trust, by which slaves were conveyed, described them thus: "Nine slaves in the possession of A, and six in the possession of B," it was held that the slaves were described with sufficient certainty. *Galt v Dibrell.* 146
2. A deed of trust was executed by A to secure certain debts, but contained stipulations which would render it void as to creditors, but there were no creditors of A at the time. A afterwards sold to B all his interest in the property conveyed by the deed of trust but subject to the debts specified in it. The deed of trust was duly proved and registered. A afterwards contracted debts, and judgments were obtained against him: Held, that the sale to B was not void as to such

creditors, and that the property was subject to the debt specified in the deed of trust. *Ib.*

3. Where property is conveyed to trustee to secure debts due to certain creditors, without their knowledge, they may affirm the trust when it comes to their knowledge, and it cannot be revoked by the debtor after such affirmation. *Galt v Dibrell*, 147
4. Where a maker of a deed of trust sells his interest in the property conveyed to A subject however to the debts specified in the trust, and a judgment is obtained against A and his interest sold at execution sale, the purchaser, (if indeed it is an interest which can be sold by execution at law,) can only be substituted to the rights of A, and he will hold the property upon the same conditions and subject to the same trusts that it was subject to in A's hands. *Ib.*

DEPOSITION.

1. An order of the court authorising depositions to be taken, is unnecessary in divorce cases. A commission issued without such order is sufficient authority. *Richmond v Richmond*, 343

DESCENT.

1. By the provisions of the act of 1809, c 53, an alien resident in the United States, and next of kin to an intestate who dies without issue, is entitled to inherit his estate. *Moore v Wilson*, 406
2. Where a person takes the same estate in land by a will, which without the will would have taken by descent, he will hold the estate by descent and not by devise. *Hoover v Gregory & Wife*, 444
3. Where lands descend to a child from the father, the mother will not, upon the death of the child without issue, be entitled to a life estate in the land by operation of the act of 1784, c 22, § 7. *Ib.*

DETINUE.

1. Where property belonging to A

in the adverse possession of B, and A forcibly takes the property into his possession: Held, that although A might be guilty of a trespass in so doing, yet in an action of detinue brought against him by B, B could not recover back the possession. *Neely v Lyon*, 473

DEVASTAVIT.

Vide EXECUTOR & ADMINISTRATOR, 11, 14, 15, 16.

DEVISE.

Vide WILL. *Totam*.
EXECUTORY DEVISE, 1.

DISCOVERY.

Vide EVIDENCE, 1, 2, 3, 4, 5, 6.

DISCONTINUANCE.

1. Where parties to a suit submit it and the cause of dispute involved in it to arbitration, and the submission is not made a rule of court, such submission operates as a discontinuance of the suit. *Jewell and McKee v Blankenship*, 439

DISTRIBUTIVE SHARES.

Vide LIMITATIONS, STATUTE OF 4. HUSBAND AND WIFE, 1, 2, 3.
DISTRIBUTION.

DISTRIBUTEES.

Vide DISTRIBUTION.

1. Distributees cannot recover their distributive portions without an administration on the estate of their intestate. *Truman v Shelton*, 383.
2. A person in possession of an intestate's personal property can hold it against any person, but a creditor or an administrator; to the first he is liable as executor *de son tort*; to the second, because he is the representative of the deceased upon whom the law casts his personal estate. *Ib.*
3. A party who colludes with an executor to obtain the assets, or who obtains possession of the assets by joining the executor in the perpetration of a fraud upon the estate,

or who receives the assets knowing that the executor in disposing of them, commits a *devastavit*, is liable to the distributees, and the assets may be followed in his hands. *Parker v Gilliam*, 394

DISTRIBUTION.

Vide ADVANCEMENT, 1, 2.

1. The act of 1827, c 14, which gives to widows the one half of the personal estate of their husbands, where the husband dies without child or children, only applies to cases of actual intestacy. If he dies and leaves a will, she cannot, by dissenting, become entitled to one half, but only to one third, as provided by the act of 1784, c 22. *Watkins v Dean*, 321

DIVORCE.

1. An issue to try the fact of adultery, made up on a paper distinct from the bill and answer, and submitted to the jury, is regular. *Richmond v Richmond*, 348
2. Divorce cases partake of the nature of chancery suits, and the proceedings in them are according to the course of practice in equity, except where altered by statute. *Ib.*
3. An order of the court authorising depositions to be taken, is unnecessary in divorce cases. A commission issued without such order is sufficient authority. *Ib.*
4. The answer of a defendant to a petition for a divorce, has by the act of 1796, c 19, and 1835, c 26, the effect only of making up an issue between the parties. It operates only as a plea, and it does not, as in chancery cases, require two witnesses, or one with corroborating circumstances to outweigh it. *Ib.*

DOWER.

Vide LIMITATION, STATUTE OF 10.

1. A dowress cannot maintain an action of assumpsit for use and occupation against a tenant from year to year, for rents which accrue after the death of her hus-

band, and before the assignment of her dower, although no damages were given to her when her dower was assigned. *Thompson v Stacy*, 493

2. Under the statute of 1784, c 2, § 9, authorising the widow to file her petition in the county or the circuit court of the county where her husband usually resided, if the right to dower is disputed, a jury must be empannelled to try it, and the damages are to be assessed by the jury. *Ib.*

3. If, upon a petition filed under said statute, the widow's right to dower is not disputed, and she claims damages which are not admitted, a writ of enquiry must be awarded to ascertain them. *Ib.*

4. If the widow's dower be assigned, under the provisions of the act of 1784, and no damages are assessed or given to her in that proceeding, her right to recover damages is forever gone. *Ib.*

5. If a separate and distinct action would lie by a widow to recover damages after an assignment of dower, it must be brought against the tenant of the freehold, whose duty it is to assign dower, and not against a tenant for years *Ib.*

E

EJECTMENT.

1. Where the relation of vendor and vendee, and not that of landlord and tenant exists, notice to quit previous to commencing an action of ejectment is not necessary. *Den v Webster*, 513

EJUSDEM GENERIS.

Vide WILL, 1.

ERROR.

1. In debt, where the damages recovered are more than the amount laid in the declaration, it is not error. *Thompson v French*, 452

2. Where counsel are employed to assist the solicitor in a state prosecu-

tion, it is not error for the circuit court to permit such assistant counsel to conclude the argument on the part of the government. *Jarnagin v The State*, 529

ESTOPPEL.

1. *Quere*, whether acts *in pais* by A, inconsistent with the existence of a title in himself for the same property, constitutes an estoppel. *Belcher v Belcher*, 121

EVIDENCE.

Vide RECEIPT, 1, 2, 3, 4.

MORTGAGE, 3, 4, 5, 6, 7.

1. Where the bill specially interrogates the defendant as to particular facts, (denied by the bill to exist,) and seeks a discovery from them, an answer responsive to those interrogatories, and stating affirmatively that the facts do exist, is evidence for the defendants. *Jones v Perry*, 59

2. The bill alleged, that A left a will at his death, and that the defendant had destroyed it. The answer of the defendant denied all knowledge of the will, she admitted, however, that she said on the morning after her father's death, that "she had his will," but stated, that she meant by this, certain directions given verbally by A to her, concerning the property, and which she considered as his will: Held, that this explanation was nonsensical and absurd, and being disproved by one witness, the court might act on the admission contained in the answer, wholly disregarding the explanation. *Brown v Brown & Wife*, 84

3. Although a discovery be sought from a defendant, it does not follow that all the statements made in the answer in relation thereto are to be believed. If an unreasonable and absurd explanation be given of a fact admitted therein, or if the answer contradict itself, or other parts of it are disproved, so that the credit of the defendant (as a witness) is destroyed, the court is not bound to act on the whole

- statement, although not contradicted by two witnesses, but may decree on the admission in the answer, disregarding other parts of it. *Ib.*
4. The declarations of a testator, that he never intended to give A, (who in the absence of a will would have succeeded to his property,) any thing—that he was dissipated and worthless—together with an extreme dislike to A, and a solicitude to execute his will, and its actual execution a few days before his death, in favor of his grand children, were held to be such circumstances, as with the positive swearing of one witness, were sufficient to outweigh the answer of A, denying all knowledge of the will, &c, *Ib.*
 5. If a matter stated in an answer, be a direct and proper reply to an interrogatory contained in the complainant's bill, it is evidence for the defendant, though it be in his favor. *Alexander v Wallace*, 105
 6. If, however, an answer be not a direct reply to an interrogatory in the bill, but in avoidance of some allegation which the defendant was compelled to admit, the answer is no evidence of the matter in avoidance. *Ib.*
 7. The bill charged that the testator shortly before his death, loaned the defendant \$300. The answer denied all recollection of the fact: the proof of one witness was that the amount was loaned, but it appeared that a settlement of accounts had taken place between the testator shortly before his death and a receipt in full executed: Held, that if the loan were made before the settlement it was embraced in it, if afterwards the evidence should show the fact to be so, and as the proof did not show whether the loan was before or after the settlement, it could not be charged to defendant. *Jones v Ward*, 160
 8. When receipt may be explained by parol evidence. *Vide receipt.*
 9. If an answer is not responsive to some charge or interrogatory in the bill, and the answer is replied to, facts alleged in it, by way of avoidance, must be proved. *Cocke v Trotter*, 213
 10. A prosecutor cannot be asked whether he did not express suspicions of another person than the defendant, having committed the offence charged against the defendant, unless such suspicion was founded on facts within his own knowledge. *Rhea v The State*. 258
 11. It is not competent for the defendant to prove by a witness, that he, the witness, had heard a slave confess that he committed the act, with which the defendant was charged. *Ib.*
 12. A witness may be impeached by proving he is not worthy of credit, or that the facts to which he deposed are not true, or by cross examination in which he may be involved in inconsistencies. If the witness is impeached in either of these modes, evidence of his general good character is admissible. *Richmond v Richmond*, 343.
 13. Where the plaintiff takes the deposition of a witness and declined using it, the defendant, if he chooses, may read the deposition to the jury; but in such case, the defendant makes the witness his own, and the plaintiff is at liberty to impeach the credit of the witness. *Ib.*
 14. It is not competent to prove a statement made by a witness contradictory of his evidence, unless he deny upon oath that he had made such statement, but if such evidence is received without being objected to upon the trial, it is too late to object to it after verdict. *Ib.*
 15. Where evidence is offered, and it is objected to upon some distinct and specific ground which cannot be sustained, it is too late after verdict to object to it upon other grounds of objection, not mentioned or urged during the trial. *Ib.*
 16. In ordinary equity cases, when an issue is sent to a jury for trial, although the answer is evidence, yet it is subject to the rules applicable to other witnesses, and will be

- looked upon by the jury with all the suspicion that attaches to an interested person. *Ib.*
17. A party cannot read as evidence for himself, his own answer to a bill of discovery; but where he proposed reading bill and answer, and the defendant said, "you may read the bill," and he then read both bill and answer: Held, that the verdict will not be set aside upon this ground, especially where the reading of the bill and answer could not have varied the result. *Thompson v French*, 452
 18. Where a decree, putting a construction upon an antenuptial contract, was rendered by the supreme court of North Carolina, in a suit between A and B, it is conclusive between the same parties or their privies in this State. *Ligon v Peak*, 469
 19. A party to a suit who has given B as his surety for the costs, cannot by taking the paupers oath, have B discharged or released, for the purpose of examining him as a witness. *Black v Crain*, 516
 20. Where an indictment laid a watch stolen to be the property of A, and the proof was that B was the general owner, but that he had exchanged watches with A for a few weeks, and the watch was stolen whilst in the possession of A: Held, that A had a special property in the watch sufficient to sustain the indictment. *Yates v The State*, 549
 21. If it does not appear from the record, that the venue was proved, the judgment must be reversed. *Ib.*
- ecution at law. *Shields v Mitchell*, 1
2. Where a maker of a deed of trust sells his interest in the property conveyed to A, subject however to the debts specified in the trust, and a judgment is obtained against A and his interest sold at execution sale, the purchaser, (if indeed it is an interest which can be sold by execution at law,) can only be substituted to the rights of A, and he will hold the property upon the same conditions and subject to the same trusts that it was subject to in A's hands. *Galt v Dibrell*, 146
 3. Where the judgment of a justice has been paid or otherwise discharged, and an execution issues thereon, the circuit court, by virtue of its general power, can grant writs of *certiorari* and *supersedeas* to quash the execution, &c. *Rogers v Ferrell*, 254
 4. Where personal property is levied on by the sheriff, he may sell after the return day the execution, without a *venditioni exponas* or other process. *Overton v Perkins*, 328
 5. But where an execution is issued and levied on land, but the land is not sold on or before the return day of the writ, the sheriff cannot after the return day sell the land, without a *venditioni exponas*. *Ib.*
 6. Land was levied on but not sold before the return day of the execution. The debtor afterwards died; a *venditioni exponas* issued after the debtor's death, directing the property to be sold, but no *scire facias* or other process had issued to make the heirs or personal representatives of the debtor parties: Held, that the *venditioni exponas* was void and communicated no power to the sheriff to sell, and that equity would enjoin the sale. *Ib.*
 7. Where a defendant in an execution who resided on the land levied on, was present at the sale, but did not aid or assist in the sale: Held, that this was not a waiver of the twenty days notice in writing, required by the act of 1799, c 13. *Carney v Carney*, 491
 8. Where slaves are sold at execution

EXECUTION SALE.

Vide REDEMPTION,
EXECUTION, 9.

EXECUTION.

Vide REDEMPTION, 1, 2.

CAPIAS AD SATISFACIENDUM, 1.

1. Land held under and by virtue of a deed which is not registered, may be levied upon and sold by an ex-

8. Where slaves are sold at execution

sale, no bill of sale proved and registered is necessary as against creditors or purchasers. *Goodwin v Floyd*, 520

9. Where a party agrees with the plaintiff in the execution, that he will purchase the slaves levied on, when sold by the sheriff, but it was also agreed that he was not to pay the price bid to the plaintiff, unless the title was good: Held, that this contract did not vitiate the sale. *Ib.*

EXECUTOR AND ADMINISTRATOR.

Vide LIM. STATUTE OF, 7, 8, 23.
TRUST AND TRUSTEE.

1. The bill charged that the testator shortly before his death loaned the defendant \$300. The answer denied all recollection of the fact: the proof of one witness was, that the amount was loaned, but it appeared that a settlement of accounts had taken place between the testator shortly before his death and a receipt in full executed: Held, that if the loan were made before the settlement it was embraced in it, if afterwards the evidence should show the fact to be so, and as the proof did not show whether the loan was before or after the settlement, it could not be charged to defendant.

Jones v Ward, 160

2. A testator by his will created his executor a testamentary guardian for his children, and directed the property to be kept together for the benefit of his family, &c. One of his children, whilst at school, incurred by his extravagance a large debt, which the executor and guardian to save him from disgrace, and to preserve the elevated standing and character of the family paid, and claimed its allowance in his general account of disbursements for the family: Held, that such payments was unauthorised, and that the executor was chargeable with the amount. *Ib.*

3. An executor is liable to pay interest upon money due by him to the es-

tate, where he has been guilty of such acts of negligence or wrong administration as will disappoint the claimants, or the assets. *Ib.*

4. If an executor apply the assets in payment of a claim which he is not authorised to pay, although the payment was made *bona fide*, he must account for the principal sum with interest. *Ib.*

5. Courts of equity have a discretion to allow interest or not against executors, according to the circumstances of each case, but this is a legal discretion, governed and controlled by principles which ought not to be departed from. *Ib.*

6. Where the same individual is both executor and testamentary guardian, and before the two years limited for settling estate has expired, he pays a sum in his own wrong: Held, that the sum paid was never in his hands as guardian, and he ought only to be charged with the principal sum and simple interest from the time he paid it, *Ib.*

7. A and B were joint executors of C. B received large sums in Virginia, due to the estate of C. These sums were paid by his co-executor to C's distributees. There were also individual accounts relating to individual transactions existing between the executors. A settlement of accounts took place between them, after the payment above, and a receipt under seal of all demands of every kind and description, &c. was executed by A: Held, that this receipt *prima facie* embraced the amount paid by A, to the estate of C. *Ib.*

8. Where an administrator takes the property of a third person into possession, claiming it as part of his intestate's property, he thereby becomes personally responsible to the owner.

Cocke v Trotter, 219

9. A suit cannot be instituted against a foreign executor or administrator in the courts of this state in virtue of his foreign letters testamentary or of administration, but new letters of administration must

- be taken out according to the laws of this state. . .
Allsup v Allsup, 283
10. Where foreign administrators have closed their administration, and two of them are resident here, and the heirs and distributees as well as the administrators are before the court, if there is a surplus in their hands, they hold such surplus as trustees, and a court of chancery here may interpose between the administrators and distributees, and compel the former to pay such surplus to a creditor here. *Ib.*
11. A judgment against an executor, *de son tort*, of A, is not sufficient to give equity jurisdiction to proceed against equitable personal estate, belonging to A. *Gadsby v Donelson*, 371
12. Distributees cannot recover their distributive portions without an administration on the estate of their intestate. *Thurman v Shelton*, 383
13. A person in possession of an intestate's personal property can hold it against any person, but a creditor or an administrator; to the first he is liable as executor *de son tort*; to the second, because he is the representative of the deceased, upon whom the law casts his personal estate. *Ib.*
14. A party who colludes with an executor to obtain the assets, or who obtains possession of the assets, by joining the executor in the perpetration of a fraud upon the estate, or who receives the assets, knowing that the executor in disposing of them, commits a *devastavit*, is liable to the distributees, and the assets may be followed in his hands. *Parker v Gilliam*, 394
15. An action will not lie in this state against the executor, of an executor, for a *devastavit* committed by the latter.
Griffith v Beasley, 434
16. A judgment was obtained against A, as executor of B. A died, and appointed C his executor: Held,

that an action of debt suggesting a *devastavit*, would not lie on the judgment against C, as executor of A. *Ib.*

EXECUTORY DEVISE.

1. Testator devised personal property to his children, and then proceeded thus, "It is my wish and desire that should any of my children die without increase, that my executors shall take back the property that I have devised to them, and divide it amongst the rest of my children:" Held, that this limitation was not too remote, but created a good executory devise, if either of the devisees died without issue at the time of his or her death. *Williams v Turner*, 287
2. Testator, having two families of children, made his will, in which, after making provision for the children of his first marriage, he devised all the rest of his real and personal property to his wife, for the support of herself and children during her life, and at her death or marriage, the property devised to her was to be equally divided among his children of the second marriage; then comes this clause: "If any of my children of the second marriage die before my wife and before the division of the property, without lawful issue, it is my will that the share of such form a part of the general stock to be divided among the other children of the second marriage. If any such children die before my wife, leaving lawful issue, such issue is to take the share of the deceased parent." One of the female devisees died during the lifetime of the testator's wife, leaving a child, which child also died before the testator's wife: Held, that such child was entitled absolutely to its mother's share of the property, and upon its death, is vested absolutely in the father of such child. *Jamison v Poor*, 292

EXTINGUISHMENT.

Vide JUDGMENT, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 8, 9.

1. What is an equitable extinguishment of a debt. *Vide* Trust and Trustee, 16.

F

FAYETTEVILLE BANK.

Vide CHANCERY, 38, 39, 40.

FERRY.

1. Where public convenience requires a public ferry to be established, the owner of the soil on both banks of the river, is, in exclusion of all others, entitled by the act of 1807, c 25, to be keeper thereof. *Bridge Co. v Shelby*, 280
2. Public ferries are to be established by the county court, only in cases where the "public convenience" requires it. *Ib.*
3. If a public bridge is sufficient at all times to permit transportation safely and without delay, of all persons and effects, the mere fact that a ferry at or near the bridge, would produce competition, and thereby reduce the tolls of the bridge below the amount allowed by law, is not such a "public convenience" as will authorise the county court to establish the ferry. *Ib.*
4. The owner of land on both banks of a river has not, as a matter of right, and merely because he is owner, the privilege of keeping a public ferry. *Ib.*

FORCIBLE ENTRY AND DETAINER.

1. Two justices of the peace may, by the provisions of the act of 1833, c 65, grant a *certiorari* to remove the proceedings in a writ of forcible entry and detainer, into the circuit court. *Earl v Rice and Crenon*, 233

FOREIGN LAW.

Vide EXECUTOR AND ADMINISTRATOR, 9, 10.

LEX LOCI.

FORMA PAUPERIS.

Vide EVIDENCE.

FRAUDULENT CONVEYANCE.

Vide DEBTOR AND CREDITOR.

1. A stipulation in a deed of trust, reserving to the debtor the right of receiving the rents and profits of the lands, the hire of the slaves, and to have the superintendence and management of the merchandise, to the same extent as if the deed were not made, is totally inconsistent with the rights of other creditors and renders the deed fraudulent and void as to them. *Galt v Dibrell*, 146
2. A deed void as to creditors, is nevertheless good between the parties. *Ib.*

FRAUD.

Vide LIMITATION OF ACTIONS, 5.

BILL OF EXCHANGE & PROMISSORY NOTES, 1.

TRUST AND TRUSTEE, 16.

1. Where a widow intending to dissent from her husband's will has been prevented by the misrepresentation and fraud of the executor, from doing so within the time required by the act of 1784, c 22, § 8, a court of equity will relieve her and give to her such portion of the estate as she would have been entitled to, if she had dissented within the time required by law. *Smart and Wife v Waterhouse*, 94
2. It is a settled rule, that where an act has been prevented from being done by fraud, equity will consider it exactly as if it had been done. *Ib.*
3. Where a widow has been prevented by fraud from dissenting to her husband's will, the executor will be deemed a trustee, &c. the same as if she had dissented in time, therefore the act of limitations will

- not bar her from relief in equity. *Ib.*
4. A widow prevented by fraud from dissenting to her husband's will, within the time required by law, will be placed in equity in the same situation in every respect she would have been had she dissented in time. *Ib.*
 5. If a right be acquired by fraud, and the cause of action be concealed by fraud from the plaintiff, the statute of limitations will only run from the time the fraud is discovered. *Ib.*
 6. A intended to dissent from her husband's will; the executor represented to her that it would produce great confusion in the estate, that her distributive share was about \$5000, and that if she did not dissent she would be paid that amount; in consequence of which she did not dissent. The executor at the time he made these representations knew, or from his situation had the means of knowing, that her share would be double that amount: Held, that this was a fraud upon the widow, and that a court of equity would grant her relief. *Ib.*
 7. If no undue or improper means be used by a son to procure a voluntary deed from his father, the mere fact that the father regarded him with more favor than another child, and that the deeds were executed when the father was in some degree intoxicated, but was not insensible of what he was doing, will not be sufficient to set it aside. *Belcher v Belcher*, 121
 8. To authorise the court to set aside a deed, merely on the ground that the party making it was intoxicated, it must appear that the drunkenness was excessive, so that the party was utterly deprived of the use of his reason and understanding. *Ib.*
 9. Fraud, in a court of equity, properly includes all acts, omissions, and concealments, which involve a breach of either legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue, or unconscientious advantage is taken of another. *Ib.*
 10. Equity will not only interfere in cases of fraud to set aside acts done, but will also, if by fraud acts have been prevented from being done, interfere and treat the case exactly as if the acts had been done. *Ib.*
 11. A father conveyed by separate deeds all his property to his sons A and B. To A he gave however a much larger portion than to B. B was greatly dissatisfied, believing the arrangement to be inequitable, and he threatened violence to his brother and to the negro property conveyed to him. The father alarmed, lest B should do some act of violence to A, or to the negroes, solicited A to do something to pacify B. It was finally, at the solicitation of the father, agreed between A and B, that they should both burn the deeds executed by their father to them, revest the property in the father, and let him dispose of it by will. In pursuance of this agreement they both professed to throw their deeds in the fire. A however retained his, and burned only a copy. The father and B both supposed he had burnt the original. The father afterwards made a will, dividing the property nearly equally between them. The father and B having died, A, after their deaths brought forward his original deed, claiming the property therein, a part of which had been devised to B: Held, that this was a fraud in A upon the rights of B, which was relieviable in equity. *Ib.*
 12. If a party innocently and by mistake misrepresent a material fact, upon which another party is induced to act, it is as conclusive a ground for relief in equity as a wilful and false assertion. *Lewis v McLemore*, 206
 13. The commissioners of a town, in selling the lots, represented "that there was along the whole extent of the town a first rate steam boat landing all seasons of the year; that the landing was one of the safest and best on the Mississippi;

that on the west side of the river, immediately opposite the town, there was more elevated ground than was to be found on that side of the river, and that the nearest and best road could be made from that point to Little Rock. These statements were made in good faith, but were in fact untrue: Held, that the representations were material, and although there was no actual fraud upon the part of the commissioners, yet as the purchasers of the lots were induced to purchase under a supposition that they were true, they were entitled to relief. *Ib.*

G

GARNISHMENT.

1. A was indebted to B by note for \$100, which might be discharged in iron by a given day. The iron was not delivered by the time specified. After which period A was garnisheed as the debtor of B, and stated on his garnishment that he owed B 2000 lbs. of iron, which was condemned and sold: Held, that this did not discharge A from his liability to B, as the money and not the iron was due to B. *Miller v McLain*, 245

GIFT

1. Since the passage of the act of 1831, c 90, a parol gift of a slave, though accompanied by a delivery, is void, and passes no title to the donee. *Neely v Wood*, 486

GRANT.

1. By the provisions of the act of 1824, c 22, § 6, a person who intends entering vacant land in the occupation of another, must give to the latter thirty days notice of his intention, and if such notice is not given, the entry and grant is declared void: Held, that a grant without such notice being given, covering more land than is occupied or cultivated by another, is

not void in toto, but is only void for such part as is actually occupied and cultivated by the latter. *Den v Nixon*, 518

GUARDIAN.

Vide CONSTITUTIONAL LAW, 1, 2, 3, 4. HEIRS, 1.

1. Query, Whether a payment of a judgment or decree to a guardian *ad litem*, is valid. *Miles v Kaigler*, 10
2. Payment of a judgment or decree to the father, as guardian by nature, does not discharge the judgment or decree. *Ib.*
3. A guardian by nature has only the care and custody of the infant's person; he has no control whatever over his property, real or personal. *Ib.*
4. Guardianship regularly cases when the ward attains full age, or in case of a female ward, upon marriage under age. *Jones v Ward*, 161
5. It is the duty of a guardian to rent his ward's land. When it has been rented he will be charged with the amount he received, and when not rented out, he must, in cases where it could have been rented, be charged with its estimated value. *Ib.*
6. Guardians, under our statutes, are charged with compound interest. *Ib.*

H

HEIRS.

Vide CONSTITUTIONAL LAW, 1, 2, 3, 4.

1. Where a *scire facias* was issued to subject real estate descended to minor heirs, to the payment of their ancestor's debts, personal service thereof, as well upon the heirs themselves, as upon their guardians, is necessary. *Crutchfield v Stewart's lessee*, 237

HOTCH POT.

Vide ADVANCEMENT, 1, 2.

HUSBAND AND WIFE.

1. A distributive share of an estate does not vest in the husband of the distributee until reduced to possession, and in case of his death before such possession, it survives to his wife. *Ross v Wharton*, 190
2. A died, leaving a large personal estate to be distributed between his wife and two children. His wife and another administered upon his estate, and she took all the personal property into possession and held it for more than two years. The widow again married, and the property continued in her and husband's possession until his death. There was no division of the property during the second husband's life: Held, that the possession of the wife before marriage was merely as administratrix or trustee, that the possession of the husband and wife after marriage was as administrator and administratrix, and that the property not having been distributed or divided in the lifetime of the husband, there was not such a reduction into possession by the husband, as vested the wife's share in him, and consequently it survived to her. *Ib.*
3. Possession of a distributive share of the wife by a second husband as administrator, &c., is not such a possession as will prevent the wife's right of survivorship, in case of his death. *Ib.*
4. A husband having administered on his deceased wife's estate, after payment of her debts, is entitled as husband, in his own right, and in exclusion of her next of kin, to all her personal property. *Hamrico v Laird*, 222
5. But where the husband, by an antenuptial contract relinquishes and releases all claim by virtue of his marital rights, to the separate estate of his wife, the next of kin of the wife will be entitled to it. *Ib.*
6. Where, by an antenuptial contract, certain property belonging to the intended wife was settled to her separate use, and it was also stipulated "in order that it may fully

appear that the money or property purchased by the same is to remain hers, (the intended wife's,) and the said John Hamrico, (the intended husband,) agrees and binds himself, his heirs, &c. to relinquish all claim he has or ever could have to the property so purchased, or money, either in law or equity, that he might have by marrying and becoming the husband, &c., and that she, the said Sarah Tuttle, shall have the sole disposal and management of the same, with as much right, power and authority as if a marriage had never taken place between the parties," &c: Held, that this was a relinquishment of the marital rights of the husband absolutely, and not merely during the coverture. *Ib.*

I

IMPROVEMENTS.

1. Where defendants took possession of land, under a void deed, believing however that they had title, they will be allowed for any valuable and permanent improvements they may have made, provided they do not exceed the amount of rents and profits for which they are chargeable. *Jones Perry*, 59
2. A *bona fide* possessor of land, from whom the same had been recovered, is entitled to such improvements as have permanently improved the land, provided the value thereof does not exceed the value of the rents and profits. *M'Kinly v Holliday*, 477
3. But where a party improves land, with a knowledge of, or notice of a better title in another, he is not entitled either in law or equity to any diminution from the rents and profits by reason of said improvements. *Ib.*
4. The different acts of assembly allowing the value of improvements to be recovered at law, are reconcileable with the constitution to

the extent above laid down, but no farther. *Ib.*

INDICTMENT.

1. Where a prosecutor is not marked on the back of an indictment, as required by the act of 1801, c 30, the omission need not be pleaded in abatement, but may be taken advantage of at any time. *Medaris v The State*, 239
2. An indictment alleged, "that the defendant, on the first day of August 1836, in the county of Greene, with force and arms, one chesnut sorrel mare, the property of John A. Park, did unlawfully and forcibly take from and out of the possession of the said John A. Park:" Held, that this charge did not constitute an indictable offence. *The State v Farnsworth*, 261
3. Where, by the terms of their charter, the proprietors of a turnpike road forfeited their right to receive toll if they permitted the road to be out of repair, they are also liable in such case to be proceeded against by an indictment for a nuisance. *Simpson v The State*, 525
4. The indictment charged that the defendant did unlawfully, &c. "thrust," "stab," &c. &c.: Held, this was sufficient, without describing the injury by the term "cut" or "wound." *Jarnagin v The State*, 529
5. Where an indictment is lost, the court during the term has power to supply it, by making a copy a part of the records, provided the judge of his own knowledge or recollection knows it to be a literal copy. *The State v Harrison*, 542
6. The entry, making a copy of a bill of indictment a part of the record, must show that the judge was satisfied from his own recollection that it was a true copy and that the original was lost. *Ib.*
7. Where an indictment laid a watch stolen to be the property of A, and the proof was that B was the general owner, but that he had ex-

changed watches with A for a few weeks, and the watch was stolen whilst in the possession of A: Held, that A had a special property in the watch sufficient to sustain the indictment. *Yates v The State*, 549

INFANTS.

Vide CONSTITUTIONAL LAW, 1, 2, 3, 4.
BILL OF SALE, 1.

INTEREST.

Vide EXECUTOR AND ADMINISTRATOR, 3, 4, 5, 6.
LEGACY, 1.
PAYMENT, 1.
GUARDIAN, 6.

1. Interest on the hire of slaves due at the end of each year calculating it on each item down to the taking of the account, should be allowed; but it is erroneous to compound it, by adding the interest to the principal at the end of every year. *Cocke v Trotter*, 213
2. Where trustees in a directory trust, were directed to loan out money to the best advantage, one of whom received the money and wasted it: Held, that the other ought not to be charged with compound interest. *Deaderick v Cantrell*, 264
3. Where the declaration, in debt, for services rendered, stated the debt to be due the 1st January, 1836: Held, that as time in such case was not material, interest could be recovered from the time the debt was due, although it was due anterior to the time laid in the declaration. *Thompson v French*, 453

INTOXICATION.

Vide FRAUD, 7, 8.

J

JURISDICTION OF CHANCERY.

Vide CHANCERY.

JUDGMENT.

Vide PROCHEIN AMIE, 1.
 GUARDIAN, 1, 2, 3.
 CHANCERY, 1.
 SURETY, 1.
 SHERIFF, 1, 2.

1. Whether a judgment has been paid by a third person for the debtor, or he has taken an assignment of it to himself, as a purchase, depends upon the proof, if the latter, it is not an extinguishment of the judgment. *Hardeman v Burge*, 202

JURY.

Vide NEW TRIAL, 1, 2, 5.

1. Where the *venire facias* directs the sheriff to summon "good and lawful men," to serve as jurors, it is sufficient, without specifying the particular qualifications necessary to constitute them "good and lawful" jurors. *The State v Alderson*, 523
2. In proceedings in superior courts, it is not necessary that the record should show the qualifications of the jurors. *Ib.*
3. A plea in abatement, that one of the jurors who found the presentment was neither a freeholder nor a householder of the county in which the presentment is found, is bad. *The State v Bryant*, 527
4. A citizen of one county, who owns freehold lands in another county, or who is the owner of an occupant right to lands situated in another county, is a good and lawful juror of the county in which he resides. *Ib.*
5. Where a jury in a capital case cannot agree upon a verdict, the court has not the power, without the consent of the prisoner, to discharge them. *Mahala v The State*, 532
6. Where the jury in such a case is improperly or illegally discharged, it operates as an acquittal. *Ib.*
7. The courts have power to discharge juries in criminal causes, only in cases of manifest necessity. *Ib.*
8. The cases of necessity which will authorise a court to discharge a jury, are of three classes: 1st. Where the court is compelled to adjourn before the jury agree. 2d. Where the prisoner, by his own conduct, places it out of the power of the jury to investigate his case correctly, or, where, by the visitation of providence, he is prevented from attending to his trial. 3d. Where there is no possibility for the jury to agree and return a verdict. *Ib.*
9. Sickness or insanity of one or more jurors, exhaustion before they can agree, or the absconding of one or more jurors, constitute cases of necessity which will authorise the court to discharge the jury. *Ib.*
10. But where the jury cannot agree, because their minds cannot come to the same conclusion from the evidence, it is not such a case of necessity as will authorise their discharge. *Ib.*
11. The jury in this case were empannelled on Thursday evening at 2 o'clock; they came in once or twice during the same evening, and declared they could not agree; they were however kept together all night by the court, and at 9 o'clock the next morning, upon their declaring they could not agree, the court discharged them. The court continued its session until the next day, (Saturday:) Held, that this was not such a case of necessity as authorised the court to discharge them. *Ib.*
12. Where the circuit judge stated, "that the jury are the judges of the law as it applies to the facts, they are the exclusive judges of the facts, but in making up their verdict they are to consider the law in connexion with the facts, but the court is the proper source from which they are to get the law, in other words, they are the judges of the law as well as the facts, under the direction of the court: Held, that this was a correct exposition of the law. *Dale v The State*, 551

L

LACHES.

1. Where a trust is created to secure the payment of debts which is not attempted to be enforced for ten years, this is not such laches as will discharge the trust to creditors. *Galt v Dibrell*, 146

LAND.

1. What is a good description of land. *Vide Report*, 1.

LANDLORD AND TENANT.

Vide LIMITATIONS, STATUTE OF, 22.

LAND WARRANTS.

1. The issuance by the commissioners of a certificate land warrant to a person not entitled thereto, is not conclusive upon the rights of the real owner. *Maury v Lewis*, 115
2. The act of 1807, c 2, empowered the commissioners to decide upon the validity of claims presented for adjudication, but their decision and the issuance of the certificate, do not affect the rights of persons having conflicting claims. *Ib.*
3. A court of chancery has jurisdiction to examine into the execution of the power conferred by the act of 1807, c 2, upon the commissioners to adjudicate land claims. *Ib.*

LAW AND FACT.

Vide JURY, 12.

LEGACY.

Vide LIMITATIONS, STATUTE OF, 4.

1. A contingent general legacy will not bear interest until the contingency on which it is to vest occurs; but where a legacy is specific, and only the time of its enjoyment postponed, it bears interest from the testator's death. *Jones v Ward*, 160

LEX LOCI AND LEX FORI.

1. The law of the place where a contract is made governs its construction, and where certain formalities

are indispensable to its validity at the place where it is executed, the want of these renders its invalid every where, provided they affect the merits of the contract. *Galt v Dibrell*, 146

2. Where the maker of a deed of trust of slaves resided in Tennessee, (the slaves being then in Virginia,) and the slaves were afterwards removed to Tennessee, they became subject to the laws of Tennessee, and if the deed is not recorded in Virginia, it is necessary as to creditors, to register it in Tennessee according to her laws. *Ib.*
3. Where suits cannot be maintained against foreign executors. *Vide Alsup v Alsup's heirs*, 283

LICENSE.

Vide CHANCERY, 33.

1. *Query*. Whether a parol license to erect a mill and to overflow land, can be revoked, after considerable expense has been incurred in erecting the mill and dam. *Caldwell v Krott*, 209

LIEN.

Vide VENDOR AND VENDEE, 4, 5, 6, 7.
DEBTOR AND CREDITOR, 4, 5, 6.

LIFE ESTATE.

Vide WILL, 1, 2, 3, 4, 5, 6, 9, 10.

1. Legatees for life of personal property are entitled to the useful and profitable enjoyment of the property, so far as it is consistent with its preservation; with its usual and ordinary increase, and with the security of the title of the person entitled to the remainder. *Henderson v Vaulx & Wife*, 30
2. Where slaves are bequeathed for life in this State, the legatee for life has no right or power to remove them beyond the limits or jurisdiction the State. *Ib.*

LIMITATION OF ESTATE.

Vide following titles—WILL—REMAINDER—LIFE ESTATE—EXECUTORY DEVISE.

LIMITATION, STATUTE OF

1. Statutes of limitation do not expressly apply to courts of chancery, but are by them enforced by analogy in all cases where the matter in controversy would have been barred in a court of law, could it have been prosecuted there. *Burdine v Shelton*, 41
2. Where an action of debt is brought to recover money paid by mistake, it will not be barred until the expiration of six years from the time it was so paid; so if a bill is filed in chancery to recover money paid by mistake, the limitation of six, and not of three years forms a bar to the suit. *Ib.*
S. P. Bedford v Brady, 350
3. A party, who is in possession of land for seven years, holding adversely, under and by virtue of an unregistered deed, is protected by the second section of the act of 1819, to the extent of the boundaries of his deed. *Jones v Perry*, 59
4. Legacies and distributive shares are not affected by the act of limitations. *Smart, & Wife v Waterhouse*, 94
5. If a right be acquired by fraud, and the cause of action be concealed by fraud from the plaintiff, the statute of limitations will only run from the time the fraud is discovered. *Ib.*
6. The defendant sold and appropriated certificate land warrants belonging to A; A filed a bill to recover the proceeds: Held, that the defendant could not avail himself of the act of limitations, without pleading or relying upon it in his answer. *Maury & Wife v Lewis*. 115
7. The creditor of a deceased debtor, resident at the time of his death, and at the time his administrators qualified without the limits of the State, but who removed within two years after the grant of administration, into this State, and before suit brought, is not barred by the act of 1789, c 23, until three years from the qualification of the administrator. *Hubbard v Smith & Morelock*, 249
8. By the act of 1789, c 23 creditors of deceased persons residing without the limits of the State, are allowed three, and creditors within the State two years from the qualification of the personal representatives, to commence their suits. In such cases the residence of the creditor at the time of administration granted, and not at the time of the suit brought, determines the question whether his debt shall be barred in two or three years. *Ib.*
9. Where dower has not been assigned to a widow, in the lands of her deceased husband, a possession of seven years by the heirs, or those who come in under them, will not, by virtue of the act of 1819, c 28, § 2, bar her right or claim thereto. *Guthrie & Wife v Owen*, 339
10. Where a party sues in equity for a demand upon which, if sued for at law, an action of debt might have been brought, the act of limitations of six and not of three years will bar the complainant. *Bedford v Brady*, 350
S. P. Burdine v Shelton, 41
11. The statute of limitations will not bar a bill filed to redeem mortgaged property. *Yarborough v Newell*, 376
12. In cases of direct trust, the mere denial by the trustee of the right of the *cestui que trust* will not be sufficient to protect the possession of the trustee, he must in order to make his possession adverse, show that the *cestui que trust* knew that he was holding adversely for himself and not as trustee. *Ib.*
13. Where a party constitutes another his agent merely for the purpose of tendering redemption money due on a mortgage, which he does, and the mortgagee denies the mortgagor's right to redeem, this is not such notice to the mortgagor of a denial of his right to redeem as will constitute an adverse holding by the mortgagee. *Ib.*
14. To change the relations which exist between the mortgagor and mortgagee, and to constitute the possession of the latter adverse to the former, there must be actual

- personal knowledge by the mortgagee that the mortgagor is holding adversely to his right—constructive notice will not be sufficient. *Ib.*
15. Before the statute of limitations can operate as a bar to the recovery of the property, there must not only have been an adverse holding for the time prescribed by the statute, but there must have been some person in existence capable of suing, and not within any of the savings of the statute. *Thurman v Shelton*, 388
 16. Where a bill of sale of slaves was made by a person *non compos mentis*, and who continued such until the time of his death: Held, that up to the time of his death, the statute of limitations did not run against him, because persons *non compos* are excepted out of the operation of the statute—and that after his death, it did not begin to run until administration was granted on his estate. *Ib.*
 17. To revive a debt barred by the act of limitations, there must be an express promise to pay, or an admission of an existing debt still due, which the debtor is willing to pay. *Thompson v French*, 452
 18. What will be sufficient to revive a debt barred by the act of limitations, is a mixed question of law and fact—the jury must find the facts, and the court must declare the law, arising upon said facts. *Ib.*
 19. It is the legitimate province of the court to examine the proof adduced upon a plea of the statute of limitations, in order to see whether the finding is correct; and it is not bound by the verdict to the same extent, as when the question is one of unmixed fact, and when the conclusions thereon are to be drawn by the jury. *Ib.*
 20. Where the testator frequently spoke of the services rendered to him by the defendant, and always declared a determination to remunerate him, and said in reference to those services, "that as yet he had made him but little remuneration, but that he would compensate him tenfold:" Held, that this was an admission of an existing liability, and a willingness to pay, which took the case out of the operation of the act of limitations. *Ib.*
 21. It is not necessary in order to revive a debt barred by act of limitations, that the admission or promise should be for a specific sum *in numero*. *Ib.*
 22. Where a tenant, after the expiration of his term but whilst in possession, disclaims his landlord's title and holds adversely for seven years afterwards: Held, that the act of limitations would not protect him, unless his disclaimer was known to the landlord, and possession was held adversely seven years afterwards. *Watson v Smith*, 476
S. P. Yarbrough v Newell, 376
 23. A administered upon the estate of B, and died within six months thereafter. C then administered. From the time of the grant of administration to A, to the commencement of this suit more than two years had elapsed, but less than two years from the grant to C: Held, that the act of 1789, c 23, limiting suits against executors and administrators to two years did not bar the suit. *Atkinson v Brooks*, 484
 24. Where a judgment is rendered against one of two sureties, who pays the judgment: Held, upon a motion made by him against the personal representatives of his co-surety, for contribution, that the act of limitations commenced running against him from the time he paid the money, and not from the time the judgment was rendered against him. *Maxey v Carter*, 521
- ### LOAN.
1. Where property is loaned by a father-in-law to his son-in-law, and the latter, after retaining possession thirteen years, re-delivers it to his father-in-law, who *bona fide* retained it as his property for eight days, and then re-loaned it to his son-in-law: Held, that the father-

in-law does not forfeit his right under the provisions of the act of 1801, to creditors and purchasers of the son-in-law, who became such after the second loan, unless the son-in-law had five years possession after the second loan was made. *Dowell v Bailey & Cochran*. 489

M

MARITAL RIGHTS.

Vide HUSBAND AND WIFE.

MISREPRESENTATIONS.

Vide FRAUD.

MORTGAGEE.

Vide MORTGAGE.

MORTGAGOR.

Vide MORTGAGE.

MORTGAGE.

Vide REGISTRATION, 4, 5.

LIMITATION, STATUTE OF, 12, 13, 14, 15.

1. A pawnee or mortgagee of slaves, where he has possession, is subject to the same responsibilities and duties that exist in the case of a hirer. *Overton v Bigelow*, 48
2. A mortgagee who has possession of a slave is the owner of the slave for the time being; he must account for the hire of the slave and must furnish, at his own cost necessary food, raiment, and medical attendance when necessary. *Ib.*
3. Although a bill of sale, absolute on its face, may be converted by parol evidence into a mortgage, yet the parol proof must be clear, decisive, and without doubt. *Lane v Dickerson*. 373
4. Mere inadequacy of consideration, coupled with general remarks by the defendant at different times, that he intended to "let complain-

ant redeem the property," that "no other but complainant should redeem," that "he might have the property by paying thirty per cent." &c., is not sufficient evidence to convert an absolute bill of sale into a mortgage. *Ib.*

5. Where the proof of a parol defeasance is contradictory and uncertain, it will be held insufficient to change an absolute bill of sale into a mortgage. *Ib.*
6. Although a bill of sale of slaves be absolute on its face, yet as between the parties, it may be shown by parol proof or by parol defeasance to be a mortgage. *Yarbrough v Newell*, 376
7. In all cases where an absolute deed is executed to secure the payment of a debt or money loaned, the contract will be valid and effectual in equity as a mortgage. *Ib.*
8. To change the relations which exists between mortgagor and mortgagee, and to constitute the possession of the latter adverse to the former, there must be actual personal knowledge by the mortgagor, that the mortgagee is holding adversely to his right—constructive notice will not be sufficient. *Ib.*

MOTION.

Vide SHERIFF, 1, 2.

MULTIFARIOUSNESS.

Vide CHANCERY, 54, 55.

MURDER.

1. In order to constitute murder in the first degree, a design must be formed to kill wilfully, that is of purpose, with the intent that the act by which the life of a party is taken, should have that effect—deliberately, that is with cool purpose—maliciously, that is with malice aforethought; and with premeditation, that is, the design must be formed before the act by which the death is produced, is performed. *Dale v The State*. 551

NEW TRIALS.

Vide BILL OF EXCEPTIONS.

1. Where a part of jury in a capital case, the trial of which lasted several days, frequently separated themselves at night from their fellow jurors, for fifteen or twenty minutes at a time, without being under the charge of an officer, it was held that this was such an irregularity as vitiated the verdict. *M'Lain v The State*, 241
2. Where there is an unauthorised separation of a jury for fifteen or twenty minutes, it is not necessary for the prisoner to prove that they were during their absence tampered with; it is sufficient if they might have been. *Ib.*
3. The act of 1801, c 6, § 59, which says, "that not more than two new trials shall be granted to the same party," means that when the facts have been fairly left to the jury upon a correct charge of the court, and they have thrice found a verdict for the same party, no new trial shall be awarded; it does not apply to cases where verdicts have been set aside for error in law. *Trott v West, Moss & Co.* 499
4. In general, if the bill of exceptions does not state that all the evidence in the cause is contained in it, the court will presume the evidence was sufficient to support the verdict. *Ib.*
See Yates v The State.
5. Where a jury retired to a room of the building wherein the court was held, to consider of the verdict, without being accompanied by an officer, and it did not appear that they improperly separated, or that there had been any communication with them: Held, that a new trial ought not to be granted. *Jarnagin v The State*, 529

NON-RESIDENT.

Vide CHANCERY, 17, 18, 19, 20, 21.

NOTICE TO QUIT.

Vide EJECTMENT, 1.

OCCUPANT.

Vide IMPROVEMENTS.
GRANT.

P

PARENT AND CHILD.

1. A parent is not bound to employ counsel to defend the suits of his minor children. *Hill v Childress*. 514
2. An express contract is necessary to enable an attorney to recover compensation from a father for services rendered his minor child, in defending him upon a charge of murder. *Ib.*
3. The law never implies a promise to pay, unless the consideration has passed to the person sought to be charged, or to some other person for whom he is bound by law to provide. *Ib.*
4. An express promise to pay need not however, be proved by direct and positive testimony, it may be inferred from circumstances; as where an attorney appears for a minor, and the father is present aiding, assisting, and consulting with the attorney in conducting the defence, in the absence of proof to the contrary, a jury would be warranted in finding that the attorney had been retained by the father. *Ib.*
5. Where one man is bound by express contract to pay for services rendered, the law, in general, never imposes the same obligation on another by implication. *Ib.*

PAUPER.

Vide EVIDENCE, 19.

PAYMENT.

Vide PROCHIEU AMIE, 1,
GUARDIAN, 1, 2, 3.
JUDGMENT, 1.
CERTIORARI, 2, 3, 6.

1. Where payments have been made, interest must be calculated on the principal up to the time of pay-

ment, the amount paid deducted, and the balance charged as principal, &c. *Jones v Ward*, 161

PAWNEE.

Vide MORTGAGE, 1, 2.

PLEADING IN CHANCERY.

Vide CHANCERY, 13, 14, 15, 39, 40, 47, 48, 49, 50, 54, 55.

PLEADING.

1. A plea that the defendant tendered iron, &c. must aver, "that he has always since the tender been ready to deliver the same," or it is bad. *Miller v McLain*, 245
2. Pleas in abatement are *stricti juris*, and are not favored in law. *The State Bryant*, 527
3. A plea in abatement, that one of the jurors who found the presentment was neither a freeholder or householder of the county in which the presentment is found, is bad. *Ib.*

POWER.

Vide WILL, 2.

POWER OF ATTORNEY.

Vide BILL OF EXCEPTIONS, 1.
DEED, 4.

1. Where a record of a judgment states that A produced a power of attorney to confess judgment for B &c., this is sufficient without setting out the power of attorney. *Galt Dibrell*, 146
2. As to probate of power of attorney. *Vide* DEED 4.

PRACTICE IN CHANCERY.

Vide CHANCERY, 16, 28, 35, 36, 47, 52.
REPORT, 1.

PRACTICE.

Vide CERTIORARI, 2, 3, 6.
CONTINUANCE, 1.
DISCONTINUANCE, 1.

1. After a suit has been pending several terms, an affidavit made by the defendant upon which to ground a rule for the plaintiff to

show by what authority the suit was instituted, must state specially the cause or reason why the application was not sooner made.

Wilson v Turk, 247

2. The practice of the circuit courts to dispose on the first day of the term of causes which are not litigated, and to which no defence is intended to be made, is unobjectionable. *Crisman v Curle*, 488
3. Where counsel are employed to assist the solicitor in a state prosecution, it is not error for the circuit court to permit such assistant counsel to conclude the argument on the part of the government. *Jarnagin v The State*, 529

PROCESS.

Vide HEIRS, 1.

PROCHIEN AMIE.

1. A *prochien amie* has no legal right or power to compound or receive the money due upon a judgment recovered by him in the name of an infant, and a payment to him of such judgment is a nullity; particularly if the payment is made after the judgment has been enjoined and the cause is depending in a court of chancery. *Miles v Kaigler*, 10

PROCEDENDO.

Vide CERTIORARI, 2, 4.

PROMISSORY NOTE.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY CONTRACT.

1. A note for one hundred dollars, which may be discharged by 2000 lbs. of iron by a given day, becomes a money contract if the iron is not paid or legally tendered on or before the day stipulated. *Miller v McLain*, 245
2. A was indebted to B by note for \$100, which might be discharged in iron by a given day. The iron was not delivered by the time specified. After which period A was

garnisheed as the debtor of B, and stated on his garnishment that he owed B 2000 lbs. of iron, which was condemned and sold: Held, that this did not discharge A from his liability to B, as the money and not the iron was due to B. *Ib.*

PROSECUTOR.

Vide INDICTMENT, 1.

PURCHASER.

Vide CHANCERY, 47, 48, 49, 50.

R

RECEIPT.

1. The bill charged that the testator shortly before his death loaned the defendant \$300. The answer denied all recollection of the fact: the proof of one witness was, that the amount was loaned, but it appeared that a settlement of accounts had taken place between the testator shortly before his death and a receipt in full executed: Held, that if the loan were made before the settlement it was embraced in it, if afterwards, the evidence should show the fact to be so, and as the proof did not show whether the loan was before or after the settlement, it could not be charged to defendant. *Jones v Ward*, 160
2. A and B were joint executors of C. B received large sums in Virginia, due to the estate of C. These sums were paid by his co-executor to C's distributees. There were also individual accounts relating to individual transactions existing between the executors. A settlement of accounts took place between them, after the payment above, and a receipt under seal of all demands of every kind and description, &c. was executed by A: Held, that this receipt *prima facie* embraced the amount paid by A, to the estate of C. *Ib.*
3. The current of modern decisions

is, that a receipt, whether made under seal or not, may be explained by parol evidence. *Ib.*

4. Parol evidence to explain a receipt, or to show that an item *prima facie* embraced within it, was really not included, should be clear, strong and irrefragable.
5. Where the general language of a receipt clearly comprehends an item of account existing between the parties at the time the receipt was given, the answer of the defendant, filed more than twenty years after the execution of the receipt, stating that the item was not embraced in it, accompanied by general testimony, that in the opinion of the witnesses the party to whom the receipt was given, was not at that time able to satisfy the item, &c. is not sufficient, to overthrow the legal effect of the receipt, or to exclude said item from its operation. *Ib.*

RECORD.

1. Where an indictment is lost, the court during the term has power to supply it, by making a copy a part of the records, provided the judge of his own knowledge or recollection knows it to be a literal copy. *Harrison v The State*, 542
2. The entry, making a copy of a bill of indictment a part of the record, must show that the judge was satisfied from his own recollection that it was a true copy, and that the original was lost. *Ib.*

REDEMPTION.

1. Before a creditor can, by virtue of the acts of 1820, c 11, and 1823, c —, redeem property sold at execution sale or under a deed of trust, he must obtain a judgment against the debtor, whose property has been sold. *Woods v McGavock*, 133
2. Where a creditor whose debt was secured by a deed of trust, verbally promised to A that if he would purchase the property at the trust sale, and bid a certain amount for it, he, the creditor, would not re-

- deem it for any balance due to him by the debtor, on the faith of which promise A did bid the amount and make the purchase, and made valuable improvements on the land: Held, that such creditor would not be permitted afterwards to redeem the land. *Ib.*
3. Where a debtor, whose property has been sold at execution sale, attempts to redeem it from the purchaser, the latter, if his judgment has not been satisfied, has other *bona fide* debts due from the debtor, may credit the debtor with the sum proposed to be advanced, and may bid in the same manner, and to the same extent, as if the attempt to redeem was by a creditor under the 3d and 4th sections of the act of 1820, c 11. *Cooley v Weeks*, 141
 4. Where property is proposed to be redeemed and the original amount is tendered, it is the duty of the purchaser to receive the amount and convey the property, or if he is willing to give more, he should propose an advance and credit his judgment with the amount thus bid or advanced. *Ib.*
 5. Where a legal amount due to the purchaser is tendered to him by the debtor, he has no right to insist on the debtor's paying whatever amount may still be due him from the debtor before he will permit him to redeem, without offering to credit or discharge the debtor of the debt. *Ib.*
 6. Where the purchaser, upon a legal tender being made to him, neglects or refuses to bid or advance any part of the debt still due him he cannot do it after the expiration of the two years limited to redeem. *Ib.*
 7. Where a legal tender has been made by a debtor to a creditor to redeem a slave, the former is accountable for hire from the time of the tender; but he may set off in equity against the hire, a judgment debt due to him from the debtor. *Ib.*
 8. To redeem property sold at execution sale, under the provisions of the act of 1824, c 20, the party must deposit the amount required by law in "money," i. e. gold and silver, with the clerk of the county court of the county wherein the property was sold. *Lytle v Etherly*, 389
 9. A check for money, drawn by two parties in a banking house upon their bank, indorsed upon the back thereof, by their cashier, "good," and deposited by the complainant with the clerk of the county court to redeem from the defendant land he purchased at execution sale, is not a deposit of "money" within the meaning of the act of 1924, c 20. *Ib.*
 10. If the amount of money deposited with a clerk to redeem land, be not sufficient, the party is not entitled to redeem. *Ib.*

REGISTRATION.

Vide EXECUTION, 1.

VENDOR & VENDEE, 1, 2, 3, 7.

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its preservation, with its usual and
ordinary increase, and with the
security of the title of the person
entitled to the remainder. *Ib.*

- 5 Persons to whom personal property
is limited in remainder, have a
right to be protected and secured
against probable danger of its dea-
struction, or against more than or-
dinary deterioration or an hazard
of the title. *Ib.*
6. Where slaves are bequeathed for
life in this state, the legatee for
life has no right or power to re-
move them beyond the limits or
jurisdiction of the state. *Ib.*
7. A remainder in a slave or other
chattel, to vest in possession after
the determination of a life estate
therein, cannot be created by a
parol declaration or sale; such re-
mainder to be valid, must be evi-
denced by a deed, will or other
writing. *Payne v Lassiter*, 507
8. Under the provisions of the act of
1784, a parol sale of a slave, ac-
companied by delivery of posses-
sion, is valid between the parties,
but a parol sale of a slave, unac-
companied by delivery, and to
take effect after the death of the
vendor is void. *Ib.*

REPORT.

1. When the report of the clerk and
master, upon which a decree is
made, does not identify the land
sold, but refers to the mortgage
deed, which is a part of the re-
cord, as containing the descrip-
tion, it is sufficiently certain.
Sims v Cross, 460

S

SALE.

Vide SHERIFF'S SALE, 1.
BILL OF SALE.

1. Under the provisions of the act of
1784, a parol sale of a slave, ac-
companied by delivery of posses-
sion, is valid between the parties,
but a parol sale of a slave, unac-
companied by delivery, and to

take effect after the death of the vendor is void. *Payne v Lassiter*, 507

SCIRE FACIAS.

Vide HEIRS, 1.

SETT OFF.

1. Where in equity a fund belonged to A, but the legal interest therein was in B, A filed a bill to prevent B from getting the fund into possession: Held, that if A was indebted to B, in a less amount, equity would compel him to discharge the debt, before the fund will be decreed to him, especially if A is insolvent. *Alexander v Wallace, et al.* 105
2. Where a tender has been made by a debtor to a creditor to redeem a slave, the former is accountable for hire from the time of the tender; but he may sett off in equity against the hire, a judgment debt due to him from the debtor. *Cooley v Weeks*, 141
3. Upon an appeal from the judgment of a justice of the peace to the circuit court, the defendant may, in the latter court, prove his account by his own oath as an offset, although he did not make or offer to make, such a defence before the justice. *Clark v Howard*, 250

SHERIFF.

1. A sheriff who does not reside in the "county" or "district" from which an execution issues, is not liable to be proceeded against by motion for a failure to return the process. *Wood v Orr*, 505
2. The act of 1835, c 19, § 6, subjecting sheriffs and their sureties to judgment on motion for a failure to return process, whether the sheriff lives in the "district" or "county," from whence the execution issued or not, is prospective in its operation, and only applies to defaults subsequent to the act. *Ib.*

SHERIFF'S SALE.

Vide EXECUTION, 4, 5, 6.

1. A joint owner of a steam boat conveyed in trust his interest therein to secure debts, on one of which the other joint owner was liable as security; a judgment was obtained against the latter, and his interest in the boat levied on and sold: Held, that the validity of this sale could not be affected by the deed of trust, and the neglect of the trustee to sell under it, or his refusal to agree that the whole boat should be sold at the same time. *Hardeman v Burge*, 202

SLAVES.

Vide REDEMPTION, 7.

1. Courts of chancery in this State interfere and protect the property and possession of a master to his slaves, although there may be a remedy at law. *Henderson v Vaulx & Wife*, 30
2. Where slaves are bequeathed for life in this State, the legatee for life has no right to remove them beyond the limits or jurisdiction of the State. *Ib.*

STOCK.

Vide BANK STOCK.

SURETY.

1. When a judgment is obtained against the principal and surety in a note or bill single, and the party who obtained the judgment agreed with the principal to stay execution for six months: Held, that such agreement will not discharge the surety. *Peay v Poston*, 111
2. By the provisions of the act of 1809, c 69, where a judgment is rendered against two or more sureties, they may, before payment thereof, obtain a joint judgment on motion and without notice, against their principal, but a separate judgment by each for the whole debt, is unauthorised by the act, and is void. *M'Nairy v Eastland*, 310

INDEX.

has paid the judgment principal, is subject to all the rights of creditor, nor need creditor in such case, be filed by the surety, *Ib.*

order may, notwithstanding act of 1801, c 19, in matter in discharge which constituted a fund of equitable relief, made of that act.

Watson and Gibson,
362

plainant, the accomoder on a bill single, and the holder to sue prior endorsers at if suit had been money could have made, but which he did, until they became joint holders, (notwithstanding by default in payment against the com- he was discharged *Ib.*

at time by the creditor principal, unless it is an agreement binding creditor, will not discharge. *Ib.*

a note take a further and agree to give by discharges the debt. *Hull v Bostick,*
410

reement by the holder to the principal and, yet if he take a note payable at a future date, in absence of proof, an engagement to security becomes void. *Ib.*

ENDORSHIP.

See WIFE, 1, 2, 3.

T

TENDER.

Vide REDEMPTION, 3, 4, 5, 6, 7, 8, 9, 10,
PLEADING, 1.

1. A tender made in bank notes, if not objected to at the time, on that account, is good. *Cooley v Weeks,*
141

TITLE.

Vide DETINUE, 1.

TOWN, COMMISSIONERS OF

Vide FRAUD, 12, 13.

TRUST AND TRUSTEE.

1. Where property is conveyed to trustees to secure debts due to certain creditors, without their knowledge, they may affirm the trust when it comes to their knowledge, and it cannot be revoked by the debtor after such affirmation.
Galt v Dibrell, 147
2. Where a trust is created to secure the payment of debts which is not attempted to be enforced for ten years, this is not such laches as will discharge the trust as to creditors. *Ib.*
3. A will directed and authorised the executors to sell lands; the executors proved the will; joined in the sale and conveyance of the lands, and took the notes for the purchase money payable to themselves: Held, that this was an acceptance by both, of the trusts of the will.
Deoderick v Cantrell, 263
4. Trusts, in regard to the responsibility of co-trustees for the acts of each other, are of two classes, discretionary and directory, and the rules which govern each class, as

- to their liability for each other, are different. *Ib.*
5. A discretionary trust, is, when by the terms of the trust, no direction is given as to the manner in which the trust fund shall be vested, till the time arrives when it is to be appropriated in satisfaction of the trust. *Ib.*
 6. A directory trust is where, by the terms of the trust, the fund is directed to be vested in a particular manner till the period arrives when the trust is to terminate. *Ib.*
 7. In order to charge a trustee, in cases of discretionary trusts, for the acts of his co-trustee, some act by which the trust fund was obtained by his co-trustee, or some act of commission amounting to gross neglect, in permitting the fund to be wasted, must be shown. *Ib.*
 8. When a trust fund is paid into the hands of one trustee, by the act, direction or agreement of the other; or where the latter had it in his power to have controlled or received the money, and did not, both are responsible. *Ib.*
 9. A trustee is liable for a breach of trust by his co-trustee, where the money has been received jointly by them; or where a joint receipt is given, unless it is satisfactorily shown that the joining in the receipt was necessary, or merely formal, and that the money was in fact paid to his co-trustee. *Ib.*
 10. Trustees were directed to sell land upon a credit; the land was sold by them; the notes for the purchase money were executed to them jointly, and remained in the hands of one, with the assent of the other, to collect; the court was inclined to the opinion that in such case, both were responsible if the money were collected and wasted by him in whose hands the notes were left. *Ib.*
 11. Where one trustee wrongfully permits the other to detain the trust fund a long time in his hands without security, he will be deemed liable for any loss. *Ib.*
 12. Where a trustee voluntarily permits a co-trustee to receive purchase money, and retain it a considerable time without calling for it, contrary to the trust, he will be responsible for its loss. *Ib.*
 13. Where the trust is directory, and the fund is not vested, or is vested in a different manner from that pointed out, it is an abuse of the trust for which all are liable, though but one received the money. *Ib.*
 14. In directory trusts, all the trustees are bound to attend to the directions of the trust, and all must be careful to execute the trust faithfully and according to its terms, and in compliance with the intention of the person by whom it was created. *Ib.*
 15. Where trustees in a directory trust were directed to loan out money to the best advantage, one of whom received the money and wasted it: Held, that the other ought not to be charged with compound interest. *Ib.*
 16. A testator, in bad health, and about going to the south, made his will, in which his wife was made residuary legatee. He held a note on his father, which he intended to will to him, but omitted it, whereupon he endorsed on the back of the note, "If I should never return, I wish this note given up to my father," and requested his wife to deliver it to his father, which she agreed to do. He, however, returned from that trip, and being about to take another, he told several witnesses that if he never returned he wished the note given up to his father; he frequently spoke to his wife also, and directed her, in case of his death, to give the note to his father, which she either promised to do, or acted in such manner as to induce him to believe she would do so. After his death, his wife qualified as his executrix, and claimed the note as residuary legatee: Held,
 - 1st. That it was a fraud in the wife to claim the note, and that, under the above circumstances, she was constituted in equity a trustee for complainant.
 - 2d. That the above facts amounted in equity, to an extinguish

W

WAGER OF LAW.

1. Wager of law has never been allowed or recognised in the courts of this State, and wherever it is not allowed, debt will lie against an executor upon a simple contract made by his testator. But if it were allowed, and debt were brought, the error can only be taken advantage of by demurrer.
Thompson v French, 452

WIDOW.

1. Where a widow intending to dissent from her husband's will, has been prevented by the misrepresentation and fraud of the executor, from doing so within the time required by the act of 1784, c 22, § 8, a court of equity will relieve her and give her such portion of the estate as she would have been entitled to, if she had dissented within the time required by law.
Smart & Wife v Waterhouse, 94
2. Where a widow has been prevented by fraud from dissenting to her husband's will, the executor will be deemed a trustee, &c., the same as if she had dissented in time, therefore the act of limitations will not bar her from relief in equity.
Ib.
3. A widow prevented by fraud from dissenting to her husband's will, within the time required by law, will be placed in equity in the same situation in every respect she would have been had she dissented in time.
Ib.
4. A intended to dissent from her husband's will; the executor represented to her that it would produce great confusion in the estate, that her distributive share was about \$5000, and that if she did not dissent she would be paid that amount; in consequence of which she did not dissent. The executor at the time he made these representations knew, or from his situation had the means of knowing, that her share would exceed that amount: Held, that this was a fraud

upon the widow, and that a court of equity would grant her relief.
Ib.

5. The act of 1827, c 14, which gives to widows the one half of the personal estate of their husbands, where the husband dies without child or children, only applies to cases of actual intestacy. If he dies and leaves a will, she cannot, by dissenting, become entitled to one half but only to one third, as provided by the act of 1784, c 22.
Watkins v Dean, 321

WILL.

Vide EXECUTORY DEVISE.

1. Testator devised as follows:—"I give and bequeath to James Williams, son of Sam. all the land that I possess not otherwise disposed of by this will. I also bequeath to him Big Jim and his wife and all their children, also Pat and his wife and their two youngest children. I also give him all my stock of all kinds, household and kitchen furniture, with all my notes and accounts, with my still, whiskey, and every thing else not otherwise disposed of," &c. Held, that the residuary clause was not restrained to articles *ejusdem generis* with those immediately preceding it, but passed all the residue of the testator's estate, including slaves not bequeathed.
Williams v Williams, 20
2. Testator devised as follows: I give and bequeath to my beloved wife, &c. all my estate, both real and personal, including houses, negroes, cattle, and every other species of property, as well that which is now in possession as that which may hereafter be acquired, together with my money on hand, debts, claims of all kinds or description whatever, and all my lands, tenements, hereditaments, with all appurtenances belonging or appertaining to her, her heirs or assigns, during her natural life; at her death, it is my will and desire she shall have the disposal of one half the property to whomsoever she thinks proper; the other

- share of the property, and upon its death, is vested absolutely in the father of such child. *Jamison v Poor*, 292
12. An instrument, which does not purport to convey any property of which the maker was owner, at its date, but gives "the one half of all the property of which he may die seized and possessed, is, although in the form of a deed, testamentary in its character, and only operates and takes effect as a will. *Watkins v Dean*. 321
13. Testator by his codicil says, "since I have signed the above, (i. e. the will,) I find I had forgotten to make provision for my daughters; after the death of my wife, I wish my negroes to be sold, except negro boy Jack," &c. and three others named in the will. He then bequeaths \$200, to one of his daughters, and no more, and directs all his debts, stock of horses and cattle, &c. to be equally divided among all the children, including the daughters: Held, that the proceeds of the slaves ordered to be sold do not vest in the daughters, but are undisposed of. *Pearce v Gleaves*. 359
14. In the construction of a will the court, in endeavoring to arrive at a knowledge of the testator's intention, must take into consideration the circumstances as they existed at the time the will was made. *Hoover v Gregory & Wife*, 444
15. If the court is satisfied from the language of a will, what the testator's intention was when he made it, such intention must prevail, how different soever the circumstances of his family may have afterwards become. *Ib.*
16. A testator devised a house and lot to his daughter, the rents of which were to be appropriated to her maintenance and education, but if the house rented for more than was necessary for her support and education, whatever surplus was over, he gave to his wife and only son. He then devised the residue of his estate "equally between his wife, and two children aforesaid." He next appointed his executors, and then follows this clause, "I do further will, that if my said daughter should die before she is of age and without issue, her estate herein devised to go to the survivor:" Held, that the testator meant by this the survivor of his two children, and that upon the death of both, without issue, the wife surviving, she was not entitled to the property devised to the daughter. *Ib.*
17. Where a person takes the same estate in land by a will, which without the will he would have taken by descent, he will hold the estate by descent and not by devise. *Ib.*
18. To constitute a good *nuncupative* will, by virtue of the provisions of the act of 1784, c 25, § 15, the making thereof must be proved by two witnesses, both of whom were present at the same time and heard the same declaration. *Tally v Butterworth*, 501
19. The *factum* or making of a *nuncupative* will cannot be proved by two witnesses, neither of whom at one and the same time heard the same declaration, but each of whom heard a different declaration made at a different time, but both in substance of similar import. *Ib.*

WITNESS.

Vide EVIDENCE, 2, 3, 10, 11, 12, 13, 14, 15, 16.

E. J. M.

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